No. ——— (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Supreme Court, U.S.
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CABLE NEWS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; ROBERT RAINEY; DONALD HOOPER; and JACK HAMANN,

Petitioners,

v.

PAUL W. BERGER, ERMA R. BERGER; UNITED STATES OF AMERICA; RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; and KRIS A. MCLEAN;

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do members of the news media engage in "joint action" with the government, sufficient to subject them to liability for constitutional violations as if they were government actors, when for independent newsgathering purposes they arrange to observe and are present when government law enforcement agents execute a search warrant?

2. Do law enforcement agents violate the Fourth Amendment when they permit the news media to observe, for independent newsgathering purposes, the execution of an otherwise proper search warrant?

RULE 29.6 LISTING

Time Warner, Inc. is the parent company of Petitioner Turner Broadcasting System, Inc. ("TBS") which, in turn, is the parent company of Petitioner Cable News Network, Inc. ("CNN"). Neither TBS nor CNN has any nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann (collectively, "CNN") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these related cases.

OPINIONS BELOW

The opinion of the court of appeals is reported at 129 F.3d 505. App. 1a-26a. The decisions of the district court are unreported. *Id.* at 27a-48a, 49a-60a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on November 13, 1997. CNN's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 25, 1998. This Petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the First and Fourth Amendments to the Constitution of the United States, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. CONST. amend. I.

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

U.S. CONST. amend IV.

STATEMENT OF THE CASE

This case concerns a common newsgathering practice known as a "ride along," in which a journalist accompanies law enforcement agents and observes them at work.[1] Here, the Ninth Circuit held that a twenty-four-hour news network's request for a ride along, a federal agency's granting of that request, and the ride along itself—in

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[1] *See, e.g., Parker v. Clarke*, 905 F. Supp. 638, 644 (E.D. Mo. 1995), *aff'd in part and rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997); *see also Wilson v. Layne*, —— F.3d ——, Nos. 96-1185, 96-1188, 1998 WL 159673 (4th Cir. Apr. 8, 1998) (en banc).

which the network's reporters observed and recorded news footage as the agency executed a criminal search warrant —amounted to "joint action" between the news network and the agency, subjecting the private newsgatherers to liability for an alleged Fourth Amendment violation as if they were government actors.

For two independent reasons, the Ninth Circuit's far-reaching holding merits review by this Court. First, the holding conflicts with opinions from other courts of appeals and raises an important question of federal law as to whether journalists may be treated as arms of the government when, for independent newsgathering purposes, they arrange for access to government activities. More broadly, the case conflicts with this Court's holdings regarding the state action doctrine and the contours of that doctrine as applied to private parties who act autonomously and out of private choice, but whose conduct intersects with government activities. Second, the holding presents an important question of federal constitutional law that has not been, but should be, settled by this Court: whether an otherwise reasonable search becomes unreasonable, and thereby violates the Fourth Amendment, when members of the news media witness it.

A. Factual Background

Petitioners herein are Cable News Network, Inc., a twenty-four-hour television news network; its parent company, Turner Broadcasting System, Inc. ("TBS"); Jack Hamann, a news reporter for CNN; and Robert Rainey and Donald Hooper, CNN employees who served as Hamann's camera crew.[2]

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[2] Respondents Paul and Erma Berger, plaintiffs below, brought two separate actions arising from the events described here. One named Cable News Network, Inc. and Hamann as defendants; the other named TBS, Rainey, and Hooper, as well as certain federal government actors (the United States of America, an Assistant U.S. Attorney, and four U.S. Fish and Wildlife Service agents) as defendants. The actions proceeded on identical courses in the district court and were treated as consolidated on appeal. App. 7a,

Reporter Hamann is a Seattle-based correspondent for CNN who regularly reports on environmental matters and other news from the western United States. ER *Hamann* 5/2; *Hanlon* 8/2.[3] In 1993, while working for the CNN Environment Unit, he heard reports that western ranchers were poisoning endangered species in violation of federal law, often with impunity since local officials and juries were sympathetic toward the ranchers' efforts to protect livestock from predators. ER *Hamann* 5/2; *Hanlon* 8/2. Hamann decided to investigate what, if anything, federal authorities were doing to stop the illegal wildlife killings. In the course of his newsgathering investigation, he learned that the United States Fish and Wildlife Service ("FWS") would be conducting a raid of the property of a rancher suspected of poisoning wildlife. In fact, the FWS was investigating a report that rancher Paul Berger was killing eagles unlawfully on his 75,000-acre property near Billings, Montana.

In March 1993, a federal magistrate issued FWS agents a search warrant and two seizure warrants, authorizing them to search the Berger ranch for evidence that wildlife were being killed in violation of federal law. ER *Hamann* 5/3-4; *Hanlon* 8/3-4. The FWS agents executed the warrants on March 24, 1993 and seized evidence. Berger was charged with violating federal laws that prohibit killing eagles. A jury convicted him of applying a pesticide to sheep carcasses with the intent to kill predators, including eagles, in violation of 7 U.S.C. § 136j(a)(2)(G). He was acquitted of three other charges. *United States v. Berger*, CR 93-46-BLG-JDS (D. Mont. Oct. 20, 1993). App. 7a.

49a n.1. This Petition is brought solely by CNN. CNN has been informed that the individual government agents are filing a separate petition for certiorari.

[3] The excerpts of record ("ER") refer to the two volumes the Bergers filed in each of the two actions ("*Hamann*" or "*Hanlon*", respectively). The references are to the tab number within the ER and the exhibit within the tab.

Prior to the execution of the warrants, but at least two months after the FWS had initiated its investigation of Berger, the FWS gave CNN permission to accompany its agents during the execution of a search. App. 4a. This permission was confirmed in a letter stating that the government "agrees to allow CNN to accompany USFWS Agents as they execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993." The letter further stated that CNN retained "complete editorial control" over any footage it recorded of the search, but that CNN would not show any footage until such time as doing so posed no risk to any defendant's fair trial rights.[4]

As part of its newsgathering efforts, CNN attended a briefing for FWS agents the day before the warrants were executed. Hamann asked a few questions regarding the nature of the poisons allegedly used by Berger and local ranchers' views about federal authorities, ER *Hamann* 5/8; *Hanlon* 8/8/Tape 5/pages 4, 6, but the record contains no evidence that CNN played any role in the briefing, assisted in planning or executing the search, or coordinated in any way with the government beyond what was necessary to arrange to obseve and record the search for newsgathering purposes.

On the day of the search, the large group of government agents executing the warrants drove to the ranch, followed in a separate, private vehicle by Hamann, Rainey and Hooper. ER *Hamann* 5/8; *Hanlon* 8/8/Tape 6/page 3-Tape 7/page 2. One of the government vehicles had a small, fixed CNN camera mounted on its hood facing into the vehicle, and FWS agent Joel Scrafford wore a microphone that transmitted sound to the CNN crew. App. 6a; ER *Hamann* 5/8; *Hanlon* 8/8/Tape 7-Tape 20/page 1. While the FWS agents executed the warrant, the journalists videotaped portions of the agents' authorized search of the ranch, its outbuildings and surrounding public

[4] This was the complete substance of the letter, which is set out in its entirety in the Ninth Circuit opinion. App. 4a-5a.

roads. App. 6a. CNN never entered the Bergers' home, though Agent Scrafford did, with Berger's consent. *Id.* Berger's voluntary conversations with the FWS agent both inside and outside the house were recorded through the microphone Scrafford was wearing. *Id.*

After Berger's conviction, CNN used portions of its footage of the search on the environmental news programs "Earth Matters" and "Network Earth" as part of its news coverage of government efforts to protect endangered species. The programs were shown in October 1993 and several times in 1994. App. 2a; ER *Hamann* 5/9; *Hanlon* 8/9. CNN retained sole control over the footage, which never has been used in any fashion besides the newscasts, nor been provided to the government.

B. Proceedings Below

After Berger's criminal conviction, he and his wife brought these civil actions against CNN and the government. The Bergers sued under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), claiming (1) that the federal agents violated Plaintiffs' Fourth Amendment rights by permitting the news media to attend and record the search, and (2) that by observing the search CNN acted under color of federal law and thus was accountable for the Fourth Amendment violation as if it too were a government actor. App. 3a.[5] Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1367(a).

The district court granted summary judgment for all Defendants. The court correctly noted that to establish *Bivens* liability, Plaintiffs had to prove Defendants (1) acted under color of federal law and (2) deprived them of a constitutionally protected right. App. 41a n.3, 54a

[5] The Bergers brought other federal and state law claims, and sought an injunction restraining CNN's future broadcasts of its news footage. App. 3a. None of these claims is at issue in this Petition.

n.3. The court held that the Bergers' claim against CNN failed to establish the first element:

> the media defendants were not acting under color of law when they filmed the execution of the search. When a private party, such as [CNN], is present during a search as a means of furthering its own interests, it is not acting under color of law and is not liable under *Bivens*.

Id. at 41a; *accord* 54a. As to whether the FWS deprived the Bergers of a constitutionally protected right, the court found that it was not clearly established that the Fourth Amendment is violated when law enforcement agents allow news crews to accompany them during the execution of a valid search warrant, and therefore that the government defendants were entitled to qualified immunity. *Id.* at 36a-37a, 45a n.5. The court distinguished cases in which a private party *assisted* in executing a warrant or *participated with* government agents in the search for evidence, noting that "CNN was simply observing the agents who were serving the warrant." *Id.* at 36a.

The Ninth Circuit reversed. On the *Bivens* question, the court began with the premise that because of the arrangements CNN made with the FWS to facilitate its newsgathering efforts,

> [t]his was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming.

Id. at 9a-10a.

The Ninth Circuit found that CNN acted under color of law, despite its private status, because it was a "willful participant in joint action with the [government] or its agents," and thus could be held liable under *Bivens*. *Id.* at 18a. Without discussing CNN's independent newsgathering purpose for observing the search, the panel found "[FWS] agents planned and executed the search in a manner designed to enhance its entertainment, rather than its

law enforcement value . . . and to portray themselves as tough, yet caring investigators . . . ." The court found that CNN and the government obtained a "mutual benefit" or engaged in a conspiracy sufficient to hold CNN liable under this Court's "state action" cases, including *Dennis v. Sparks*, 449 U.S. 24 (1980), *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). The Ninth Circuit based this "joint action" finding solely on the letter confirming CNN had permission to observe the FWS activities, and CNN's presence at the FWS briefing and search. App. 19a.

The Ninth Circuit also reversed the district court's finding of qualified immunity for the FWS agents. The court held that the agents violated the Fourth Amendment by allowing CNN to "invade" the Bergers' property and by conducting a search "intended to serve a major purpose other than law enforcement"—namely, obtaining "publicity" for the government, and "material for . . . commercial programming" and "entertainment" for CNN. *Id.* at 2a, 10a.

REASONS THE WRIT SHOULD BE GRANTED

This Petition should be granted because the Ninth Circuit's opinion conflicts with decisions of this Court and other courts of appeals, and raises important and unsettled questions of federal law regarding the reach of the "state action" doctrine and the nature of the Fourth Amendment.

I. CNN, A PRIVATE NEWSGATHERER, DID NOT BECOME A "STATE ACTOR" BY WITNESSING THE ACTIONS OF LAW ENFORCEMENT AGENTS OR BY RECEIVING CONFIDENTIAL GOVERNMENT INFORMATION.

The Ninth Circuit erroneously concluded that members of the news media engage in "joint action" with the government, sufficient to subject them to liability for constitutional violations as if they were government actors,

when for independent newsgathering purposes they arrange to observe and are present when government law enforcement agents execute a search warrant.

First, the opinion ignores the principle, established by this Court, that when a private party acts out of uncoerced, independent initiative to achieve private—not governmental—goals, the party cannot be deemed a "joint actor" with the government. The Ninth Circuit opinion also directly conflicts with a recent ride along case from the Eighth Circuit, which along with other courts of appeals recognizes that private conduct is not subject to constitutional liability merely because it intersects with government actions. *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).

Second, the Ninth Circuit based its holding that CNN was "jointly engaged" with the FWS entirely on circumstances that other courts of appeals have held to be legally insufficient to impose constitutional liability on private actors: the existence of a contract between the government and the private party and the government's provision of information to the private party.

Third, the Ninth Circuit decision conflicts with opinions of this Court holding that institutionally and professionally autonomous private parties, properly exercising their professional functions, cannot be treated as government actors for purposes of constitutional liability. Labeling as "state actors" members of the news media who are engaged in private newsgathering activity imposes constitutional liability on private actors whose interests do not coincide with, and institutionally are antagonistic to, those of the government.

Fourth, the Ninth Circuit opinion threatens to erode news media access to, and therefore public understanding of, government law enforcement activities in a manner inimical to the First Amendment.

A. The Ninth Circuit Opinion Ignores the Principle, Established by This Court and Other Circuits, That a Private Party Is Not a Government Actor When Its Conduct Is an Exercise of Independent Choice Motivated by Private, Not Governmental, Ends.

The Ninth Circuit reached the extraordinary conclusion that a private news network is subject to *Bivens* liability [6] and is treated as an arm of the government even when the network acted independently and on its own initiative to arrange to observe first-hand the government's response to an important environmental and law enforcement problem. Equally remarkable, the Ninth Circuit so held despite acknowledging that CNN accompanied the FWS *not* to search the Berger ranch, but for private reasons distinct from any governmental interest. *See* App. 2a ("the media wanted footage . . . and the government wanted the publicity"); *id.* at 23a (noting, in reversing district court's dismissal of state trespass claim, that "the officers invited the media for *newsgathering*, not for law enforcement") (emphasis added). Because the parties literally acted concurrently in arranging for CNN to observe the FWS search, CNN was found to be a "joint actor" with the FWS—even though its conduct was a matter of private choice, its purpose was independent of the government's, and its actions were free from government coercion or influence at all times.

This holding is inconsistent with this Court's decisions analyzing when private parties act under color of law by virtue of "joint action" with the government. Of course, the starting point of this analysis is that, generally, consti-

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[6] To establish a *Bivens* claim, the plaintiff must prove the defendant acted under color of federal law. This is akin to the "under color of state law" showing required under 42 U.S.C. § 1983. *Butz v. Economou*, 438 U.S. 478, 500-01 (1978). Both standards generally are treated as the equivalent of the "state action" showing required to assert other constitutional violations. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924, 928-29 (1982); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

tutional strictures apply only to government actors, not private entities. This principle is necessary to protect private autonomy:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power . . . . A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982).[7]

This principle requires courts to act prudentially and with restraint before attributing constitutional deprivations to non-governmental conduct—particularly to "private conduct that itself is the subject of constitutional protection." *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989). Applied here, the state action requirement should mean that the activities of private, independent journalists are not subject to constitutional liability, unless those activities clearly reflect governmental, not journalistic, choices. By imposing *constitutional*—as opposed to merely statutory or common law[8]—liability on CNN, the Ninth Circuit opinion infringes on the presumptive freedom journalists have to choose privately how to gather news.

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[7] In the words of one commentator, since

> human values are many, conflicting, and irreconcilable, private persons and institutions should be presumptively free to act in accordance with manifold and differing values. . . . The [state action] doctrine frees private persons to act in accordance with many and competing values, unless legislation—popularly enacted and popularly revocable—intervenes to require private compliance with constitutional values.

Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 Sup. Ct. Rev. 129, 137.

[8] The Bergers also alleged causes of action under Montana trespass and emotional distress law, which remain pending.

To find an exception to the rule that a private party is not liable for deprivations of constitutional rights, the private party's conduct must "be fairly attributable" to the government. *Lugar*, 457 U.S. at 937. This requires that the private actor "must be a person who may fairly be said to be a state actor." *Id.*

A review of this Court's case law demonstrates the consistent principle that private parties may not "fairly be said to be" government actors when their conduct is a matter of autonomous, private choice and initiative. Converting private conduct to "government action" requires that the government either has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private] choice must be deemed to be that of the state." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "The conduct of a private entity is not subject to constitutional scrutiny if the challenged action results from the exercise of private choice and not from state influence or coercion." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 411-12 (1995) (O'Connor, J., dissenting).[9]

This dichotomy—between private autonomy and initiative on the one hand and affirmative governmental influence or coercion on the other—is critical to determining whether a private party can be treated as a state actor. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), for

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[9] Though Justice O'Connor's discussion in *Lebron* of the role of private choice in the state action determination arose in a dissenting opinion, the majority did not dispute her analysis, which synthesizes and restates this Court's state action cases. Rather, the majority found it unnecessary to decide whether the actions of a private entity could be regarded as state action, holding the entity in question—Amtrak—was not private for constitutional purposes. Justice O'Connor dissented because she found the argument that Amtrak was a public entity was outside the question presented for review, and therefore found it necessary to address the "state action" question.

example, the Court held that the United States Olympic Committee ("USOC"), chartered by Congress as a private corporation, was a private actor and thus could not be liable for allegedly violating a nonprofit corporation's equal protection rights when it enjoined an unauthorized use of the term "Olympic." In reaching this conclusion, the Court relied "[m]ost fundamentally" on the principle that private conduct is not state action absent some governmental compulsion or significant encouragement:

> The USOC's choice of how to enforce its exclusive rights to use the word "Olympic" simply is not a government decision. There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right.

Id. at 547. Mere approval of or acquiescence by the government to a private act is insufficient to label the private conduct "state action." *Id. See also National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 196 n.16 (1988) (private athletic association's recommendation that state university discipline coach not state action because public and private interests "do not coincide").

The Ninth Circuit failed to recognize the principle that a private actor whose conduct is a matter of private choice and initiative is not a government actor just because the conduct in some ways intersects with government activities. Here, the Ninth Circuit opinion conflicts directly with a 1996 decision from the Eighth Circuit holding that a television news crew did not act under color of law when it went with police into a home and recorded the execution of a search warrant. *Parker v. Boyer,* 93 F.3d 445 (8th Cir. 1996), *cert. denied,* 117 S. Ct. 1081 (1997). The television station had arranged to ride along with police and, like CNN here, "was there for reasons of its own and was engaged in a mission entirely distinct from the one that brought the police to the house." *Id.* at 448. Because the news crew's acts "[a]t most . . . were committed parallel to and contemporaneous with"

the police officers' execution of the warrant, the station's actions could not be attributed to the government. *Id.*

Other ride along cases from the Eighth and Tenth Circuits similarly hold, in conflict with the Ninth Circuit opinion, that private citizens who observe and accompany police for independent purposes unrelated to law enforcement do not act under color of law. *Price v. Baker,* 693 F.2d 952 (10th Cir. 1982) (private citizen riding with spouse, a rural police officer, to keep him company, did not act under color of law when she hit suspect on her own accord); *Russ v. Ratliff,* 538 F.2d 799, 800, 805 (8th Cir. 1976) (police trainee riding with officer to learn police procedures not state actor when he was present and observed officer shoot arrestee); *see also Jones v. Taibbi,* 508 F. Supp. 1069, 1073 (D. Mass. 1981) (reporter's agreement to not publicize information about suspect in return for access to arrest scene not joint action; "[a]lthough both [police and reporter] had an interest in the suspect, their respective motives were disparate. [They] had a coincidence of interest in the plaintiff as a suspect, but not the concert of involvement that would transform [the broadcast] from a private venture" into state action); *Freedman v. Coppola,* 614 N.Y.S.2d 833 (N.Y. App. Div. 1994) (television reporter who covered claimant's arrest as part of news report not state actor absent showing that reporter "orchestrated the police investigation or played any part in deciding whether or how to arrest the plaintiff").

More generally, private parties do not act under color of law merely because their conduct occurs in proximity to government actors. Far greater interaction is required: It is necessary "that both public and private actors share a common, unconstitutional goal." *Cunningham v. Southlake Ctr. for Mental Health, Inc.,* 924 F.2d 106, 107 (7th Cir. 1991); *accord Collyer v. Darling,* 98 F.3d 211, 232 (6th Cir. 1996) (absent "shared goal" with state, private doctor hired by state to independently examine state employee not state actor), *cert. denied,* 117 S. Ct. 2439 (1997); *Price,* 693 F.2d 952 (private actor not subject

to civil rights liability where she acted not under police direction but independently and of own volition).

The Ninth Circuit failed to acknowledge the requirement—let alone to require—that the private and public parties share an unconstitutional goal. It does, however, suggest that *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), supports the Ninth Circuit's "joint action" finding, based on broad language in *Burton* that private parties act under color of law when they have a "symbiotic relationship" with the government. App. 17a, 19a-20a. *Burton*, however, does not apply in the present circumstances.

Burton held that where a public authority built and owned a public parking garage and leased space inside the garage to a restaurant, the "addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred," and the public space involved sufficed to make the restaurant a state actor such that it could not refuse to serve customers based on race. 365 U.S. at 724. Under those circumstances, "[t]he State [had] so far insinuated itself into a position of interdependence" with the restaurant that the state action finding was justified. *Id.* at 725. The Ninth Circuit extends this notion of "interdependence" and mutual benefit far beyond its origin in a public/private financial relationship by applying it to CNN's arrangements to spend a day observing, for newsgathering purposes, the FWS at work. App. 17a-19a.[10]

The Ninth Circuit's application of the "joint action" test in this manner proves Justice O'Connor's admonition that, "[g]iven the pervasive role of Government in our society, a test of state action predicated upon public and private 'interdependence' sweeps much too broadly and would subject to constitutional challenge the most pedestrian of everyday activities . . . ." *Lebron*, 513 U.S. at 411

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[10] Additionally, *Burton*'s holding expressly was limited to lessees of public property. 365 U.S. at 726. This Court reiterated the narrow applicability of *Burton* in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974).

(O'Connor, J., dissenting). The Ninth Circuit opinion subjects ride alongs—a routine journalistic technique typical of media efforts to gain access to the actions of government—to constitutional liability. "A more refined inquiry" —one fully consistent with this Court's decisions—is that "[t]he conduct of a private entity is not subject to constitutional scrutiny if the challenged action results from the exercise of private choice and not from state influence or coercion." *Id.* at 411-12 (O'Connor, J., dissenting).

Here, CNN's actions resulted from the exercise of private choice, not from governmental influence or coercion. Its purpose was to gather news, not to play any part in the government's law enforcement actions; it acted on its own behalf, not under color of law.[11] Thus, CNN should not be subject to *Bivens* liability, *regardless* of whether the government deprived the Bergers of a right protected by the Fourth Amendment.[12]

In sum, the Court should grant this Petition because the Ninth Circuit opinion, in finding joint action here, conflicts with the core rationale of this Court's state action decisions—providing breathing room for the free exercise of private, autonomous activity by shielding it from constitutional liability. *Lugar*, 457 U.S. at 936.

B. This Court and Other Courts of Appeals Consistently Have Required Far Greater Interaction Before Private Parties and Government Agents Can Be Considered "Joint Actors."

In holding CNN to be a government actor, the Ninth Circuit concluded that CNN's conduct "satisfies the joint

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[11] To the extent the Ninth Circuit opinion suggests CNN's conduct is less worthy of protection because its news programming is "commercial," the opinion fails to recognize the well-established principle that profit does not "strip communications of otherwise available constitutional protections." *Harte-Hankes Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); *accord City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1998).

[12] Although, as set forth *infra* in Section II, the Ninth Circuit's holding that the underlying government conduct in this case was unconstitutional also should be reversed.

action test," because it was "jointly engaged with [government] officials in the challenged action" or was a "willful participant in joint action" with the government. App. 19a. This articulation of the joint action test relies on broad language from cases which demonstrate that labeling private parties "joint actors" requires a far greater level of interaction and shared purpose than is present in this case. Specifically, the evidence cited by the Ninth Circuit as supporting the joint action finding—the "agreement" between the FWS and CNN and the government's provision of certain information to CNN—has been held by other courts of appeals to be legally insufficient to transform private conduct into state action.

The cases relied on by the Ninth Circuit arose in contexts that, when compared with the instant case, make clear that the Ninth Circuit applied the joint action test far too sweepingly. The statement that a private party acts under color of law when it is "jointly engaged with state officials in the prohibited action" or "a willful participant in joint activity with the State" originated in *United States v. Price*, 383 U.S. 787, 794 (1966), a case in which three civil rights workers were released from police custody, then recaptured and murdered by a group of police officers and private citizens. The criminal indictment alleged that the defendants intended to "punish" the victms in an explicit conspiracy to violate the victims' due process rights —a "brutal joint adventure [that] was made possible by state detention and calculated release of the prisoners by an officer of the State." *Id.* at 795. The private defendants in *Price*, unlike those in the instant case, both shared the government actors' unconstitutional purpose and acted in a manner significantly encouraged by the government actors.

A second case cited by the Ninth Circuit, App. 18a, *Dennis v. Sparks*, 449 U.S. 24, 27 (1980), involved allegations that "an official act of the defendant judge was the product of a corrupt conspiracy" in which private individuals bribed the judge to violate plaintiff's due process rights. Similarly, the private party in *Adickes v.*

S.H. Kress & Co., 398 U.S. 144, 152 (1970), was alleged to be "a willful participant" with local police in "an understanding to deny [plaintiff] service in [defendant's] store, or to cause her subsequent arrest because she was a white person in the company of Negroes."

In the instant case, no such "corrupt conspiracy" existed, and it is not even alleged—nor could it be—that CNN was a "willful participant" to an understanding aimed at violating the Bergers' Fourth Amendment rights. Rather, the FWS and CNN each engaged in separate and legitimate activities—the FWS gathered evidence of a crime, not news; CNN engaged in newsgathering, not law enforcement. *See Jones*, 508 F. Supp. at 1073 (no state action in ride along where "[t]he LAPD did not play any role in determining what [the reporter] would film or later telecast [and reporter] had no part in the determination as to whether or when [plaintiff] would be arrested").[13] Nonetheless, the Ninth Circuit deemed CNN a "joint actor" because of a letter "agreement" between CNN and the government[14] and because of CNN's attendance at a government briefing at which "it is also alleged that federal entities shared confidential information with the media." App. 19a. As numerous courts have recog-

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[13] *See also Donohoe v. Watt*, 546 F. Supp. 753, 757 (D.D.C. 1982) ("Even if the stimulus to act originates with the government, a private individual's independent conduct based on information supplied by a government official cannot be characterized as state-action."), *aff'd*, 713 F.2d 864 (D.C. Cir. 1983).

[14] The Ninth Circuit characterizes this letter as "a written contractual commitment between the government and the media to engage jointly in . . . the execution of a search warrant." App. 19a. This characterization is contradicted by the letter itself, which plainly states that the government agreed simply "to allow CNN to accompany USFWS Agents as they"—*the agents*—"attempt to execute a criminal search warrant . . . ." App. 5a. The letter further makes clear on its face that CNN was "engaged" solely in a private, independent newsgathering endeavor over which it retained sole editorial control. But, as discussed below, even if the letter were construed as a "contract," it still cannot support the Ninth Circuit's joint action finding.

nized, this is insufficient to support holding a private entity to be a joint government actor.

First, an agreement or contract between a private party and government actors does not transform the private actor's conduct into state action. *See Collyer,* 98 F.3d 211 (private psychiatrist hired to examine government employees not, by virture of contract, a state actor); *Gallagher v. Neil Young Freedom Concert,* 49 F.3d 1442 (10th Cir. 1995) (private firm that allegedly searched plaintiff unreasonably not state actor despite contract with public university to provide concert security); *Simescu v. Emmet County Dept. of Soc. Servs.,* 942 F.2d 372, 375 (6th Cir. 1991) ("The mere existence of a contract between a government agency and a private party is insufficient to create state action."); *Cunningham,* 924 F.2d 106 (employer under contract to provide counselor to county jail not a joint state actor when it fired counselor after jail accused him of stealing inmate food); *Jones,* 508 F. Supp. at 1072-73 (no state action where "[t]he only concerted action between the [media] defendants and the state was [the reporter's] agreement not to disclose what he knew about [plaintiff] until, if ever, [plaintiff] was arrested by the LAPD" in return for permission to film arrest).

Second, private parties do not become "joint actors" or act under color of law simply because they obtain confidential information from the government. Indeed, such a rule as applied to journalists would be antithetical to the historic and constitutionally protected role of the news media: Since the founding of this country, it has been well understood that the very purpose of a free press is to "bare the secrets of government and inform the people." *New York Times Co. v. United States,* 403 U.S. 713, 717 (1971) (Black, J., concurring); *see also* Potter Stewart, "*Or of the Press,*" 26 Hastings L.J. 631, 636 (1975) ("So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can."). Other courts have recognized that journalists cannot be held liable as state actors where "[t]he facts

alleged merely demonstrate defendants were acting as any news reporting organization typically does." *Brooks v. American Broad. Co.*, 737 F. Supp. 431, 440 (N.D. Ohio 1990) ("News reporters often have access to official reports and documents to aid them in investigating and preparing a story, but that alone does not convert these acts into state action."), *aff'd in part & vacated in part on other grounds*, 932 F.2d 495 (6th Cir. 1991). Otherwise, the news media "would be significantly discouraged from interviewing state officials to gather information on important public issues." *Phelps*, 886 F.2d at 1271; *accord Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984) (journalists not joint actors by virtue of "conspiring" with government when they act solely in professional capacity as reporters in obtaining information from public officials).

Conversely, it is well recognized that the joint action test is not satisfied when private actors, by virtue of their professions, share information with the government. For example, when such professionals in the course of doing their jobs report crimes to the authorities, they are not thereby held to be conspirators or "joint actors" with the government. *See Collyer*, 98 F.3d at 232; *Pino v. Higgs*, 75 F.3d 1461 (10th Cir. 1996) (therapist who reported patient's mental instability to police did not do so under color of law); *Lowe v. Aldridge*, 958 F.2d 1565 (11th Cir. 1992) (therapist reporting child clients' allegations of sexual abuse to police did not act under color of law).

The Ninth Circuit opinion stands as an invitation to other lower courts to overreach, in a manner that will sweep in—as "willful participation" or "joint engagement" —many other types of private conduct that intersect with government activities, but are not dictated or controlled by government actors. Under the Ninth Circuit's theory, reporters who, for example, attend a state official's press conference or obtain special access to interview a public official, could be held liable as joint actors should a court later determine that the government officials somehow behaved unconstitutionally at these events.

In sum, the Court should grant this Petition for the independent purpose of clarifying that members of the

news media permitted to observe government activity or provided information by the government do not as a result thereof become joint actors with the government. *See* Stewart, *supra,* 26 Hastings L.J. at 634 ("The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution *outside the Government* as an additional check on the three official branches.") (emphasis added).

C. The Ninth Circuit Decision Conflicts With the Decisions of This and Other Courts Recognizing That Institutionally Autonomous Entities, Such as the News Media, Are Not Government Actors.

The Petition also should be granted because the Ninth Circuit opinion conflicts with decisions of this Court holding that when a private party institutionally is autonomous from the government, its professional activities cannot be deemed government action. *Polk County v. Dodson,* 454 U.S. 312 (1981). *Polk* held that public defenders do not act under color of law, in part because of the "constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." *Id.* at 321-22. The Court recognized that it is incongruous to label as a state actor a private party who, under our system of government, "characteristically opposes" the state. *Id.* at 318.

Like the public defenders in *Polk,* CNN belongs to a profession whose independence the government is obligated, under our constitutional structure, to respect. In an analogous context, this Court has held that a television network is not a state actor and thus may reject advertisements without incurring constitutional liability. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94 (1973). 'To hold that broadcaster action is government action would thus produce a result wholly inimical to the broadcasters' own First Amendment rights . . . ." *Id.* at 140 (Stewart, J., concurring).

Many lower court decisions similarly recognize the damage to our constitutional structure that would result were members of the news media held liable for deprivations

of constitutional rights as if they were government actors. Such characterizations are contrary to this country's traditional conception of an independent press as watchdog of the government:

> Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on government power. . . . [T]he function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. *Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.*

Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470, 474 (7th Cir. 1970) (emphasis added); *accord Mims v. Philadelphia Newspapers, Inc.*, 352 F. Supp. 862, 865 (E.D. Pa. 1972) (in rejecting argument that newspaper given access to prison was state actor, court held: "They are newspaper people whose orbit is far from the governmental sphere and, by virtue of the first amendment, essentially insulated from it."). "[T]he historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice." *Resident Participation of Denver, Inc. v. Love*, 322 F. Supp. 1100, 1105 (D. Colo. 1971). This refusal to subject the news media to constitutional liability extends even to publications of state institutions, such as public university or high school newspapers: Where student editors, not school officials, exercise independent editorial discretion, the publication is not a state actor. *Yeo v. Lexington*, 131 F.3d 241, 254-55 (1st Cir. 1997) (en banc) (student editors were not state actors, given they were independent from and "[a]t times, close to adversarial" to school officials (citing *Polk*)),

petition for cert. filed, 66 U.S.L.W. 3604 (Mar. 9, 1998) (No. 97-1462).[15]

By treating journalists as an arm of the government when they are doing their jobs, the Ninth Circuit opinion conflicts with the historic and constitutional understanding of the news media as watchdog and, frequently, adversary of government. Subjecting the news media to constitutional liability in this manner encroaches on the news media's recognized right to operate free from government interference.[16] Therefore, adherence to the state action doctrine as a limit on "the reach of federal law and federal judicial power," *Lugar*, 457 U.S. at 936-37, particularly is appropriate here.

D. Subjecting Journalists to Constitutional Liability for Newsgathering Will Result in Less Public Scrutiny of Government Functions, and Thus Raises Important First Amendment Issues.

The Petition also should be granted to address the serious implications the Ninth Circuit opinion has for newsgathering. "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). More precisely, "reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial importance to citizens concerned with the administration of government." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).[17]

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[15] *Accord Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996); *Sinn v. The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976).

[16] *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.").

[17] *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring) (public has "right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of . . . police officers [and], other public servants . . . .").

The Ninth Circuit opinion threatens the ability of the press to fulfill this constitutionally recognized role of providing information about the conduct of law enforcement and other matters of public concern. CNN sought to prepare a news report about the government's efforts to enforce laws protecting wildlife, and used footage of the FWS search in its reporting on the issue. Yet the Ninth Circuit held that CNN now is subject to liability for a constitutional violation precisely for making arrangements necessary for it to perform its newsgathering function. If journalists face liability as joint government actors for arranging for access to law enforcement activities, and if by permitting such access police violate the Fourth Amendment, it is inevitable that media access to many vital law enforcement activities will cease. The result—a public less informed about the significant activities of its government —is inimical to the First Amendment.

Because even the possibility of liability in this area is likely to severely discourage news coverage of law enforcement, the Court should grant this Petition to resolve the uncertainty journalists and government agents now face in this area. The Ninth Circuit opinion leaves unclear when journalists who arrange for access to government activities sufficiently are "jointly engaged" with the government to be deemed to act under color of law. Reporters who view crime scenes with police permission, obtain access to government buildings, or attend press conferences called by public officials inherently engage in some degree of planning and joint participation; the Ninth Circuit opinion leaves uncertain when making such arrangements becomes "joint action."[18]

Resolving this uncertainty requires nothing more than adhering to this Court's admonition in *Lugar* against extending civil rights liability to private actors who are not

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[18] Adding to this climate of confusion is the conflict among the circuits over whether law enforcement agents violate a clearly established Fourth Amendment right by permitting the news media to observe and record the execution of a warrant. *See infra* Section II.

fairly characterized as government officials. Given the news media's watchdog role and history of disassociation from government, journalists who simply are gathering news cannot "fairly be said to be" government actors. *See Yeo*, 131 F.3d at 254-55 ("the analysis of whether there is state action must proceed with care" when First Amendment implicated); *Phelps*, 886 F.2d at 1271 (cautioning against imposing constitutional liability on "private conduct that itself is the subject of constitutional protection"); *Zerilli v. Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980) (affirming dismissal of Fourth Amendment-based *Bivens* action against private newspaper in part because imposing liability on press for gathering news would undermine "the values served by a free and vigilant press").

This Petition should be granted to allow the Court to preserve the important First Amendment interests raised by this case, by making clear CNN cannot fairly be described here as a joint actor with the United States government.

II. THE COURT SHOULD RESOLVE THE IMPORTANT BUT UNSETTLED QUESTION OF WHETHER GOVERNMENT LAW ENFORCEMENT AGENTS VIOLATE THE FOURTH AMENDMENT BY PERMITTING JOURNALISTS TO OBSERVE AND RECORD THE EXECUTION OF A WARRANT.

Independently, the Court should grant this Petition because the Ninth Circuit ruled on an important question of federal law that has not been, but should be, settled by this Court: whether an otherwise reasonable search or seizure becomes unreasonable, and thereby violates the Fourth Amendment, because of law enforcement agents' not uncommon practice of permitting members of the news media to be present as observers. Four courts of appeals now have weighed in—either directly on the Fourth Amendment issue or on the corresponding issue of qualified immunity—sending very conflicting signals in this regard. Guidance from the Court is necessary now to end this great uncertainty in Fourth Amendment jurisprudence so that private newsgatherers fulfilling their First Amendment-

based role, public law enforcement agents, and the lower federal courts may govern themselves accordingly.

The Ninth Circuit, following *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), held that law enforcement agents violate the Fourth Amendment when they allow journalists, for newsgathering purposes, to observe and record the execution of a warrant. In contrast, the Fourth and Eighth Circuits have held, for purposes of qualified immunity, that government agents violate no clearly established Fourth Amendment right when they permit such media access. *Wilson v. Layne*, —— F.3d ——, Nos. 96-1185, 96-1188, 1998 WL 159673 (4th Cir. Apr. 8, 1998) (en banc); *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).

In *Parker*, the court noted that "most courts" that had considered the question prior to *Ayeni* found no constitutional prohibition on permitting journalists to observe the execution of a warrant. 93 F.3d at 447 (citing *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984); *Moncrief v. Hanton*, 10 Media L. Rep. 1620 (N.D. Cal. 1984); *Higbee v. Times-Advocate*, 5 Media L. Rep. 2372 (S.D. Cal. 1980); and *Prahl v. Brosamle*, 295 N.W.2d 768 (Wisc. Ct. App. 1980)).

The Fourth Circuit, following *Parker*, recently held in a 6-5 en banc opinion that police who allowed reporters to witness the execution of a warrant inside a home violated no clearly established Fourth Amendment right. *Wilson*, 1998 WL 159673. In that case, two journalists from *The Washington Post* arranged a two-week ride along with the United States Marshals Service, during which the journalists photographed federal marshals and local police as they executed an arrest warrant inside a residence. The court of appeals held the officers were entitled to qualified immunity. The court emphasized that the officers did not exceed the scope of the warrant by allowing journalists to observe their activities, because "the reporters did not conduct a search of, or intrude into, any areas of the Wilsons' home into which the officers would not have been

permitted to go in executing the warrant." *Id.* at *3. Furthermore, the court held that the officers' decision to permit media access "served a legitimate law enforcement purpose":

> It is in fact a legitimate function of law enforcement to facilitate accurate reporting on law enforcement activities and to improve public oversight of those activities by use of the press. These efforts are important because both the deterrence of crime and the deterrence of improper conduct by law-enforcement officers are vital to the broader mission.

Id. at *5. *Wilson* thus stands in direct conflict with the Ninth Circuit opinion, which utterly failed to recognize the legitimacy of the FWS's interest in permitting public oversight of its activities through the news media.

The Ninth Circuit opinion in the instant case purports to distinguish *Parker* and *Wilson* on the grounds that the law enforcement officers in those cases did not engage in the "planning, cooperation and assistance to the media" that the FWS provided CNN. App. 12a. However, as a matter of common sense, the distinction the Ninth Circuit sought to draw between *Parker* and *Wilson* on the one hand and the facts in this case on the other does not exist: In each case—as inherently is true—the news media were able to record and witness the searches *only* after arranging to accompany the law enforcement agents in the first place and after obtaining, expressly or implicitly, the agents' approval to enter the premises being searched. *Wilson*, 1998 WL 159673, at *1 (plaintiffs claimed police violated their Fourth Amendment rights "by permitting two newspaper reporters to accompany them into [the plaintiffs'] home. . . . [T]wo newspaper reporters . . . were to accompany the officer to observe and chronicle the execution of the warrant."); *Parker*, 93 F.3d at 446 ("The police told the reporter that a weapons investigation was in progress that he might be interested in covering . . . . Sgt. Simon Risk later informed Officer Rodney Boyer that KSOK personnel would accompany him on his shift . . .

and KSOK personnel rode to the scene in a police car with Officer Boyer. . . . [The police] entered through an unlocked front door, and the KSOK personnel followed the police into the house.").

In any event, the Ninth Circuit fails to explain why providing "assistance to the media"—in the form of facilitating journalists' requests to be present when an otherwise permissible search is being conducted—makes that search unreasonable under the Fourth Amendment: If police do not act unreasonably merely by *permitting* journalists to observe a search, it is difficult to see—and the Ninth Circuit did not explain—why *planning to permit* such media access would violate the Fourth Amendment.

Neither the Ninth Circuit here nor the Second Circuit in *Ayeni* provides meaningful guidelines for future behavior. The Sixth Circuit has criticized *Ayeni* for "failing to define narrowly the right allegedly violated," noting that the Second Circuit's reliance on an overly broad conception of the Fourth Amendment as a guarantor of privacy makes it "difficult to see how a police officer could tailor his conduct under such a vague standard." *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir.), *cert. denied*, 516 U.S. 865 (1995). The same is true of the Ninth Circuit opinion, which leaves both police and journalists unsure when a government agency's facilitation of a ride along becomes "planning, cooperation and assistance," App. 12a, sufficient to violate the Fourth Amendment.

Given the division among the courts of appeals and the importance of this issue for both the news media and law enforcement agents, this Court should address the question of whether the Fourth Amendment is violated when law enforcement agents allow reporters to observe the execution of warrants.

CONCLUSION

Journalists pursuing news for independent, professional purposes do not act under color of law, even when their newsgathering activities inherently involve making arrange-

ments with government officials. By failing to recognize this, the Ninth Circuit opinion conflicts with the state action doctrine as interpreted by this Court and other courts of appeals. For this reason, and the other grounds set forth above, CNN respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96-35251

D.C. No. CV-95-00046-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs-Appellants,

v.

RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 96-35266

D.C. No. CV-94-00046-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs-Appellants,

v.

JACK HAMANN; CABLE NEWS NETWORK, INC., a Georgia corporation,
Defendants-Appellees.

Appeals from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
September 19, 1996—Seattle, Washington

Filed November 13, 1997

Before: Mary M. Schroeder and Andrew J. Kleinfeld, Circuit Judges, and Rudi M. Brewster,* District Judge.
Opinion by Judge Schroeder

OPINION

SCHROEDER, Circuit Judge:

When federal agents searched the ranch of Paul and Erma Berger in March of 1993, they acted not only pursuant to a search warrant, but also pursuant to a written contract with appellees Cable News Network and Turner Broadcasting System, authorizing the filming and recording of the search for broadcast on their environmental television shows "Earth Matters" and "Network Earth." The media wanted footage of the discovery of evidence showing that Paul Berger was poisoning eagles, and the government wanted the publicity.

After Mr. Berger was convicted of one misdemeanor count for using a pesticide in a manner inconsistent with its labeling, 7 U.S.C. § 136j(a)(2)(G), and acquitted of

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* Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

three felony counts of the killing of at least one eagle, the Bergers sued both the media and the federal agents under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for the violation of their constitutional rights. The Bergers also sued the media for the violation of the Federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.*, for various state law torts, and to enjoin further broadcasts of the video shot at their ranch. The Bergers' principal contentions under federal law are that (1) the federal agents violated their Fourth Amendment rights by permitting commercial television cameras to film the search and by assisting the media in their search for dramatic material, and (2) the media acted sufficiently in concert with the federal agents to be held accountable for that violation as government actors.

On the *Bivens* action the district court ruled that the federal agents were entitled to qualified immunity because there was, at the time of this episode, no clearly established law protecting individuals from the commercial recording of a search of their residences. The court also held that the Bergers were collaterally estopped from litigating the reasonableness of the search because the same issues had been decided adversely to Mr. Berger in his criminal trial. In addition, the court rejected the Bergers' claim that the media had become government actors for purposes of *Bivens* liability.

We reverse the judgment in favor of the federal appellees on the Fourth Amendment claim because we hold the federal officers are not entitled to qualified immunity in this case. Because we hold that the issues litigated in the criminal proceeding were not the same as the issues presented to the district court in this civil suit, we also reverse the district court's ruling that this action is barred. The judgment in favor of the media on the *Bivens* claim is reversed because, on the basis of the present record, we must consider the media to have acted jointly with the federal appellees, and hence "under color of law." We

affirm the district court's ruling that the media are not liable under the Federal Wiretap Act, however.

On the state law claims, we reverse the court's ruling in favor of the media on the trespass and infliction of emotional distress causes of action. We affirm the ruling on the conversion claim, and decline to enjoin further broadcasts.

In reviewing the grant of summary judgment to the appellees, we view the evidence in the light most favorable to the Bergers. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

FACTS AND PROCEDURAL BACKGROUND

Paul and Erma Berger reside on a 75,000 acre ranch in Montana. At the time of the search, Mr. Berger was 71 and Mrs. Berger was 81. In January of 1993, former employees of the Bergers apparently went to the United States Fish and Wildlife Service ("USFWS") and told USFWS agents that they had seen Mr. Berger poison or shoot eagles a few years earlier. Upon hearing about the investigation, the media appellees, Cable News Network, Inc. and CNN employee Jack Hamann, together with Turner Broadcasting System, Inc. and TBS employees Robert Rainey and Donald Hooper, approached agents of USFWS to see if a television deal could be worked out . The media wanted footage for their environmental programs and the government wanted to publicize its efforts to combat environmental crime. On March 11, 1993, approximately two weeks before the search was executed, the Assistant U.S. Attorney in charge of Mr. Berger's investigation, federal-appellee Kris McLean, and media correspondent Jack Hamann, executed the following letter agreement on CNN letterhead:

> Dear Mr. McLean:
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> This confirms our agreement that the United States Attorney's Office for the District of Montana agrees

to allow CNN to accompany USFWS Agents as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993. Except as provided below, CNN shall have complete editorial control over any footage it shoots; it shall not be obliged to use the footage; and does not waive any rights or privileges it may have with respect to the footage.

In return, CNN agrees to embargo the telecast of any videotape of the attempt to execute the search warrant until either: (1) a jury has been empaneled and instructed by a judge not to view television reports about the case; or (2) the defendant waives his right to a jury trial and agrees to have his case tried before a judge; or (3) a judge accepts a plea bargain; or (4) the government decides not to bring charges relating to the attempt to execute the search warrant. Please acknowledge your agreement to the foregoing by executing the signature line below.

Sincerely, Jack Hamann, Correspondent, CNN Environment Unit.

Acknowledged signature of Kris McLean, Assistant United States Attorney for the District of Montana, Helena, Montana.

cc: Jennifer Falk Weiss, CNN Legal Department. Chet Burgess, CNN Environment Unit.

On March 18, a magistrate judge issued a search warrant for the Bergers' ranch, authorizing the search of the ranch and appurtenant structures, excluding the residence, for evidence indicating the taking of wildlife. According to the Bergers, the magistrate judge had no knowledge of the planned media participation during the search, and there is no contention by the appellees that when the magistrate judge issued the warrant, he approved the videotaping of the search for broadcast purposes.

According to the Bergers, the media participated in a pre-search briefing the day before the search, at which the federal appellees shared with the media details of the material included in the warrant and supporting materials that were supposed to remain under seal until after the search.

On the morning of the search, the government team, accompanied by a media crew, gathered on a county road leading to the ranch, to discuss the execution of the warrant. The cameras videotaped that gathering. The broadcast team then proceeded with the federal agents and AUSA McLean in a caravan of approximately ten vehicles to a point near the Bergers' ranch. Media cameras mounted on the outside of government vehicles, or placed in their interior, documented every move made by the federal appellees. At all times during and immediately prior to the search, USFWS Special Agent Joel Scrafford was wired with a hidden CNN microphone which was continuously transmitting live audio to the CNN technical crew.

Mr. Berger approached and met the caravan in a pickup truck on the road leading up to the ranch. Agent Scrafford proceeded to inform Mr. Berger of the search warrant, and asked him whether he could ride to the house in Mr. Berger's truck so that he could explain to Mrs. Berger what they were going to do. Mr. Berger allowed Agent Scrafford to ride with him in the pickup truck. Upon arriving at the Bergers' residence, the two men entered the house together. Audio recorded at the site indicates that Mr. Berger consented to Agent Scrafford's entry into the home at this time. The parties disagree on whether the agents who entered the residence with Agent Scrafford searched the residence for incriminating evidence, and whether Agent Scrafford's subsequent entries into the home were consented to. However, it is undisputed that Agent Scrafford recorded all his conversations with the Bergers inside the house.

The Bergers were not informed that Agent Scrafford was wearing a microphone or that the cameras that were visible during the search belonged to the media. The media recorded more than eight hours of tape and it broadcast both the video footage and the sound recordings made in the house.

Mr. Berger was tried on an amended information charging him with the taking of at least one golden eagle, in violation of 16 U.S.C. § 668(a); the killing of one ferruginous hawk, and one ring-billed gull, in violation of 16 U.S.C. §§ 703 and 707(a); the taking of at least one bald eagle in violation of 16 U.S.C. § 1538(a)(1)(B) and 16 U.S.C. § 1540(b)(1); and the use of a registered pesticide, Furadan, in a manner inconsistent with its labeling. The charge was that Mr. Berger applied Furadan to sheep carcasses with the intent of killing predators, including eagles, in violation of 7 U.S.C. §§ 136j(a)(2)(G).

Before trial, the magistrate judge denied a defense motion to suppress evidence on the grounds that the agents lacked probable cause to search and that the warrant did not accurately describe the property to be searched. Mr. Berger was acquitted of all charges, except the misdemeanor charge of using Furadan contrary to its labeling.

The Bergers filed two actions in 1995, which proceeded on identical courses. The district court entered a final judgment in favor of all the appellees in both cases in February 1996, and these parallel timely appeals followed.

COLLATERAL ESTOPPEL

The district court ruled that because issues concerning the constitutionality of the search have already been litigated in Mr. Berger's criminal case, this action was barred by collateral estoppel. The court relied on *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991), which holds that a plaintiff is estopped from bringing a civil action to challenge an issue which was " 'distinctly put in issue and directly determined' in a previous criminal

action", and *Matthews v. Macanas*, 990 F.2d 467, 468 (9th Cir. 1993), which affirmed the dismissal of a *Bivens* action based on the preclusive effect of a Fourth Amendment ruling in a previous criminal action.

The difficulty with the district court's reasoning is that a party is generally estopped or precluded from litigating only those issues that have previously been decided. *See Allen v. City of Los Angeles*, 92 F.3d 842, 849 (9th Cir. 1996); Restatement (Second) of Judgments § 27. Collateral estoppel can thus be used in a civil action to bar relitigation of issues decided in a prior criminal proceeding, but, as *Bagley* recognized, a party may only be estopped from bringing a civil action to challenge a particular issue if that issue was " 'distinctly put in issue and directly determined' in a previous criminal action." *Bagley*, 923 F.2d at 762 (quotation omitted).

Because the magistrate judge in the criminal case was not presented with the specific issues raised in this action, the district court erred in holding that the Bergers' *Bivens* action was barred. In the *Bivens* claim, the Bergers are concerned with whether the search was unreasonable because of the media's involvement in the search.

In his motion to suppress in the criminal case, on the other hand, Mr. Berger challenged the validity of the warrant itself. He contended that (1) it failed to establish probable cause because it contained no facts indicating either the veracity of the informants, or independent law enforcement investigation to corroborate the information given by the informants; (2) the search warrant was stale; and (3) the property designated in the search warrant was improperly described.

The magistrate judge's rulings directly responded to these, and only these arguments. He agreed with the government that (1) the veracity of the informants could be presumed and that no corroboration was required; (2) the facts set forth in the affidavit indicated that Mr. Berger

was engaged in an ongoing pattern of criminal activity, so the evidence was not stale, and (3) although the description of the real estate in the warrant was "grossly excessive and inaccurate," the defect did not rise to such a level as to "offend[] the Constitution."

This case is thus fundamentally different from *Matthews*, on which the district court relied. In *Matthews*, the plaintiff incorporated by reference in his *Bivens* brief the same Fourth Amendment arguments he had presented in his criminal appeal, i.e., that the affidavit submitted in support of the search warrant would not have established probable cause had the affiant not misled the issuing court. Because a panel of this court had already held in Matthews' criminal appeal that the affidavit did establish probable cause, the panel reviewing Matthews' *Bivens* action correctly deemed the civil action barred by collateral estoppel. *Matthews*, 990 F.2d at 468. By contrast, the arguments and issues raised in the motion to suppress in this case were not the same as the arguments and issues raised in the Bergers' *Bivens* action, and therefore, collateral estoppel does not bar this civil suit.

THE BIVENS CLAIM

1. *The violation of the Fourth Amendment and immunity*

The Bergers claim that the federal appellees, AUSA Kris McLean and USFWS Special Agents Rodney C. Hanlon, Joel Scrafford, Richard C. Branzell and Robert Prieksat, are individually liable for damages caused by their active participation in the commercial television/law enforcement enterprise conducted at the Bergers' ranch. The Bergers contend that the resulting search violated their Fourth Amendment rights against unreasonable searches and seizures. We hold they are correct and that the federal officers are not entitled to qualified immunity.

This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by

a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose. The Fourth Amendment to our Constitution protects against unreasonable searches and warrants that are obtained under false pretenses:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. We must heed its strictures on the potential abuse of law enforcement powers. This search violated its protections.

Regardless of whether a constitutional violation has occurred, the federal appellees are, of course, entitled to qualified immunity if they could reasonably have believed that their conduct violated no clearly established federal statutory or constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982); *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1285 (9th Cir. 1994). The federal appellees contend that even if the search was unconstitutional, they could have reasonably believed their conduct was lawful.

The Second Circuit has held that qualified immunity does not protect federal officers in a case where a Secret Service agent invited a TV news magazine into a private home to videotape a search. *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994). *Ayeni* affirmed District Judge Wein-

stein's decision in *Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994). The Second Circuit held that even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible. This was in part because of a federal statute prohibiting any persons, other than law enforcement personnel and those assisting them from executing search warrants, 18 U.S.C. § 3105. It was in major part because the publicity purpose would "magnify needlessly the impairment of their right of privacy." *Id.* at 686.

Similarly, the Fourth Circuit has held that where the federal officer brings along an employee of a private corporation acting for the corporation's purposes, not in aid of the officer, the federal officer's conduct violates the Fourth Amendment and he is not entitled to qualified immunity. *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995). Though noting *Ayeni* with approval, the Fourth Circuit said "[w]e would so hold even if there were no reported authority directly on point," *id.* at 356, because the historical foundations of the Fourth Amendment and the statute discussed above so plainly showed that "[t]he right to be free from government officials facilitating a private person's general search" was " 'manifestly included' within the 'core' Fourth Amendment protection." *Id.* at 357. *See also Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (1981) (stating in a case in which the media was sued for trespass, that "[i]f the media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so this would be nothing less than a general warrant equivalent to the writs of assistance which were so odious to the American colonists").

We find even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforce-

ment purposes, and where the videotaping and sound recording were outside the scope of the warrant. The cases on which the federal agents rely do not hold such searches are constitutional. In *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996), the Sixth Circuit held that police were justified in permitting a television crew to be present when the warrant itself expessly authorized photography and videotaping. In *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), a majority held officers had immunity in permitting a television crew to be inside a house during a search, but one member of the panel, Judge Rosenbaum, wrote separately to state that in his view the Fourth Amendment had been violated. Another, Judge Richard Arnold, wrote that in his view the media defendants were joint actors with the police in allegedly violating constitutional rights. *See id.* at 448-49. In *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), *vacated* July 30, 1997, a majority of the panel held that the police had qualified immunity when they permitted newspaper reporters and photographers to accompany them while searching a house, but specifically refused to decide the issue of the reasonableness of the search. The dissenting member of the *Wilson* panel, Judge Russell, would have denied immunity and held the conduct patently unreasonable. The entire court has now reheard the case en banc.

In none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the media that occurred in this case. The defendants rely upon a trio of older, lower court decisions that upheld the constitutionality of searches or arrests where the police invited the media to ride along and record or photograph the law enforcement activity. *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct.App. 1980). In those cases, however, the media repre-

sentatives were viewed as playing a passive role, as observers, rather than as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here. Indeed we have already recognized the difference between videotaping searches for law enforcement purposes and for entertainment. *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996) (as amended on denial of rehearing Feb. 26, 1997, petition for cert. filed May 27, 1997). We there noted that our court and others have assumed without deciding that videotaping for law enforcement purposes does not render a search unreasonable, *see id.* at 1032 n.37, but recognized that a different result might be required if the recording were for other purposes. We cited the Second Circuit's decision in *Ayeni*, that squarely held a residential search videotaped by commercial television cameras was unreasonable, and the officers unprotected by qualified immunity. We reach the same legal conclusions in this case.

2. *The Open Fields Doctrine*

The appellees also claim that they could have violated no privacy interest in videotaping the shed and other outbuildings on the ranch, because their cameras shot footage only from the open fields or of structures in which the Bergers had no expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 360-61, 88 S. Ct. 507, 516-17 (1967) (the Fourth Amendment is not triggered unless the government intrudes into an area in which there is a constitutionally protected reasonable expectation of privacy).

Because the Fourth Amendment speaks only to "persons, houses, papers, and effects," an individual cannot claim a constitutional violation on account of law enforcement officers' warrantless searches of their "open fields." *Hester v. United States*, 265 U.S. 57, 59, 44 S. Ct. 445, 446 (1924) (Holmes, J.); *and see United States v. Dunn*,

480 U.S. 294, 107 S. Ct. 1134 (1987); *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984); *United States v. Van Damme*, 48 F.3d 461, 464-65 (9th Cir. 1995).

This argument misses the mark in this case. The open fields doctrine is not a license for the police to bring trespassers on to private property. It allows law enforcement officers to obtain evidence while on privately owned open fields. It would thus entitle the officers to prevail if the Bergers were suing them for a warrantless search of open fields for evidence of criminal activity. It does not immunize the officers from liability for conduct that has no law enforcement purpose.

Moreover, there is evidence in the record that the shed and other outbuildings that were a focus of the cameras were places in which the Bergers did have a reasonable expectation of privacy, in that they were located close to the house and guarded by a dog. The officers would not have reasonably believed the search of the outbuilding involved open fields for which no warrant was required, much less that the open fields doctrine authorized third parties to trespass.

3. *The Invited Informer Doctrine*

Throughout the execution of the search warrant, Agent Scrafford wore a microphone that transmitted live to the media the conversations between him and the Bergers in their house. The media appellees recognize that the home was outside the scope of the search warrant and that the Bergers did not consent to the microphone's entry into the home. They claim, however, that their surreptitious recording of the Bergers' conversations did not violate the Bergers' Fourth Amendment rights because the Bergers consented to Scrafford's presence and to his being a party to the conversations.

The appellees rely on the "invited informer" or "misplaced confidence" doctrine to support their claim. *See,*

e.g., United States v. White, 401 U.S. 745, 91 S. Ct. 1122 (1971); *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408 (1966); *Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424 (1966); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1147-48 (9th Cir. 1990). The invited informer doctrine was developed in cases where the government placed informers, often with recording devices, to obtain information for legitimate law enforcement purposes. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). In *Aguilar*, we held that the invited informer doctrine justifies the use of undercover agents and informers, as long as their use is part of a good faith government investigation. *See also Reporters Committee v. American Telephone & Telegraph*, 593 F.2d 1030, 1043 (D.C. Cir. 1978) ("once [people] project[] [their] activities beyond [their] private enclave, the Government is free to scrutinize them for law enforcement purpose"). The invited informer doctrine is thus rooted in the principle that privacy interests must give way to legitimate government scrutiny when a communication is voluntarily made to a third party. Our court in *Aguilar* made this rationale clear when it explained that:

> In approving this investigative technique, the Supreme Court unmistakably declared that persons have no expectation of privacy or confidentiality in their conversations and relations with other persons, no matter how secretive the setting. The Court has recognized that legitimate law enforcement interests require persons to take the risk that those with whom they associate may be government agents.

Aguilar, 883 F.2d at 703.

The invited informer doctrine does not apply in this case, because the surreptitious recording was not done for a legitimate law enforcement purpose. The recording in this case materially differs from the invited informer cases where the informer was assisting law enforcement. Here,

law enforcement authority was used to assist commercial television, not to further law enforcement objectives.

The appellees further contend that the Bergers' conversations must have been "voluntary" because the magistrate judge in the criminal proceeding refused to suppress Mr. Berger's statements for lack of the *Miranda* warnings. Their contention is without merit. The only finding the magistrate judge made was that Mr. Berger had not been placed under the functional equivalent of a formal arrest when he made the statements, so his *Miranda* rights did not attach. *See Berkemer v. McCarthy*, 468 U.S. 420, 440-42, 104 S. Ct. 3138, 3150-52 (1984). He did not rule that Mr. Berger's statements were "voluntary."

The invited informer doctrine thus does not shield the media from liability. We recognized this more than twenty years ago when we held that eavesdropping by the media for public broadcast, even in conjunction with law enforcement, violates important privacy interests. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). *Dietemann* involved the exposing of a quack doctor by media reporters who were cooperating with law enforcement officers. In *Dietemann*, conversations between the reporters and the fraudulent doctor were secretly relayed to law enforcement officers for use in their investigation, and then used in a story published by the media. Like the media appellees here, the media defendants in *Dietemann* attempted to use the "invited informer" doctrine to escape liability. We rejected their defense and explained our decision as follows:

> Plaintiff's den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen. He invited two of defendant's employees to the den. One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is

> heard and seen will be transmitted by photograph or recording, or in our modem world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man. . . .

Dietemann, 449 F.2d at 249.

We therefore hold that the Bergers had an expectation of privacy in their conversations with Agent Scrafford, and that appellees infringed that privacy when they recorded the Bergers' conversations inside the house.

The Media as Government Actors

The final issue we must consider in the Bergers' *Bivens* action is whether the media appellees may be held liable even though they were not agents or employees of the federal government. Ordinarily, *Bivens* liability and the corresponding liability of state actors under 42 U.S.C. § 1983, attaches only to the acts of government officials. *Johnson v. Knowles*, 113 F.3d 1114 (9th Cir. 1997). Private parties may be held liable, however, if they are deemed to have acted "under color of law." *Id.* at 1117 (citing *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983) (owners who obtained pervasive police assistance in evicting tenants were deemed to be joint actors with police)); *Ginn v. Matthews*, 533 F.2d 477 (9th Cir. 1976). *See also Reuber v. United States*, 750 F.2d 1039, 1058 (D.C. Cir. 1984), which held that "private status . . ., even if deemed a special factor, is not alone sufficient to counsel hesitation in implying a damages remedy when the private party defendants jointly participate with the government to a sufficient extent to be characterized as federal actors. . . ."

In deciding whether conduct of private parties amounts to government action we engage in a highly factual inquiry. *Howerton*, 708 F.2d at 383 (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81

S. Ct. 856, 860 (1961)). Four tests have been developed to facilitate this inquiry. *See Johnson* at 1118-20, where we explained each test. These tests are: (1) the governmental nexus test, *see Jackson v. Metropolitan Edison Co.* 419 U.S. 345, 351, 95 S. Ct. 449, 453(1974) (courts must consider whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [s]tate itself"); (2) the public function test, *see Jackson,* 419 U.S. at 352, 95 S. Ct. at 454 (state action is present when a private entity exercises functions traditionally and exclusively reserved to the state); (3) the state compulsion test, *see Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 2786 (1982) ("a [s]tate normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either over or covert, that the choice must in law be deemed to be of the [s]tate"); and finally, (4) the joint action test, *see Dennis v. Sparks,* 449 U.S. 24, 27, 101 S. Ct. 183, 186 (1980) (private actors can be considered [government] actors if they are "willful participant[s] in joint action with the [government] or its agents").

The appropriate test in this case is the joint action test. The Supreme Court has said it is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a government actor and a private party. *See Dennis,* 449 U.S. at 27-28, 101 S. Ct. at 186 (1980) ("Private persons, jointly engaged with [government] officials in the challenged action, are acting 'under color' of law for purposes of [*Bivens*] actions."); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 1605 (1970) ("The involvement of a [government] official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's [constitutional rights], whether or not the actions of the [government official] were officially authorized, or unlawful."); *United*

States v. Price, 383 U.S. 787, 794, 86 S. Ct. 1152, 1156 (1966) ("Private persons, jointly engaged with [government] officials in the prohibited action, are acting 'under color' of law for purposes of [*Bivens*]."). Our cases are in accord. *See Howerton, supra*; *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 746 (1997); *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498, 503 (9th Cir. 1996); *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) ("Joint action therefore requires a substantial degree of cooperative action."). *See also Gorenc v. Salt River Project Agr. Imp. & Power*, 869 F.2d 503, 507 (9th Cir. 1989) (quoting *Wilmington Parking Authority*, 365 U.S. at 725, 81 S. Ct. at 862, and explaining that joint action may take the form of a "symbiotic relationship" where the government has " 'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity. . . .' ")

In this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute—the execution of a search warrant—for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation. This satisfies the joint action test.

At least one distinguished circuit judge has suggested that the media's entry onto searched premises by virtue of

government authority would alone be sufficient to constitute joint action. *See Parker,* 93 F.3d at 449 (Richard Arnold, J., dissenting). Judge Arnold noted that "[t]he news crew came to the location with the police and could not have entered if the police had not done so first. They did not simply happen along the street at the time that a search was being conducted." *Id.* Given the record before us, however, we need not go so far. This is because under our own circuit authority, the "inextricable" involvement of the media with both the planning and execution of this search, the government's active involvement with the media's news gathering activities, and the mutually-derived benefits, is more than enough to make the media government actors. *See Gorenc, supra,* quoting *Wilmington Parking Authority,* 869 F.2d 503.

The cases relied upon by the district court are unavailing because they involved situations in which the private parties conducted searches on their own, and not under the government's cloak of authority. *See United States v. Miller,* 688 F.2d 652, 657-58 (9th Cir. 1982); *United States v. Jennings,* 653 F.2d 107, 110 (4th Cir. 1981). In *Miller* a theft victim went to the defendent thief's property to look for his stolen trailer. Although a police officer acquiesced in the visit and provided some protection from afar by keeping watch through binoculars while the victim took photographs of his stolen trailer, the officer took no active part in the search. *Miller,* 688 F.2d at 656-58. In *Jennings,* a private party, an airline security manager, searched a package containing drugs, after receiving information from the Drug Enforcement Administration. The court held that notwithstanding the fact that a DEA agent passively observed the search, the search did not implicate the Fourth Amendment because the private entity independently decided to conduct the search, and acted for its own benefit, rather than as a surrogate for the government. *Jennings,* 653 F.2d at 110-11. While the media here collaborated with the goevrnment in order to

conduct a search for its own benefit, there was nothing passive about the government's involvement with the media in this case. They acted together.

FEDERAL WIRETAP STATUTE

Next, the Bergers claim that the media appellees violated the Federal Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*, by intercepting for broadcast the Bergers' conversations with Agent Scrafford in the home. The Act is a broad prohibition against warrantless, surreptitious interceptions of wire, oral or electronic communications. 18 U.S.C. § 2511(1)(a)(c).

The Act, however, also contains a broad exception for conversations recorded by persons acting under color of law. That exception provides that:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party of the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c).

We have held that the media appellees were acting under color of law for purposes of *Bivens* liability. We recognize that the scope of the phrase "under color of law" in the wiretap context is not equivalent to the scope of the phrase in the general section 1983 or *Bivens* context. *See, e.g., Thomas v. Pearl*, 998 F.2d 447, 450-51 (7th Cir. 1993). *Thomas* held that a basketball coach who was a university employee and who tape-recorded a conversation with an athlete was not acting "under color of law" for purposes of the Federal Wiretap Act. We agree that the "under color of law" exception under the Act was not created to exempt all government employees from liability for recording conversations when only one party

has consented: Its core aim must have been to exempt those acting under law enforcement authority. Because both the federal appellees and the media appellees were acting under authority of a search warrant, the exception applies, and because Agent Scrafford, a party to the conversations, consented to the interception, we hold the media appellees not liable under the Federal Wiretap Act.

STATE LAW CLAIMS

Trespass

The Bergers have asserted a claim against the media for trespass. The Bergers allege that the media committed the tort by (1) entering into their home, for which there was no warrant, and (2) by generally being present at the Bergers' ranch during the execution of a search warrant that they contend authorized only the law enforcement officers to enter their property. Trespass is generally premised upon the intentional interference with the property rights of another without consent. *See Ducham v. Tuma*, 877 P.2d 1002, 1005 (Mont. 1994). *Ducham* quoted Restatement (Second) of Torts § 158: "One is subject to liability . . . for trespass, irrespective of whether he thereby causes harm . . . (a) if he intentionally enters land in possession of the other, or causes a thing or third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." *Id. See also* Restatement (Second) of Torts § 167 (consent is an absolute defense to trespass).

The district court held that the Bergers had no possessory interest in the ranch at the time of the search because the government agents had temporary possession and control of the Bergers' land during the execution of the search. *See, e.g., Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), where the Sixth Circuit explained that where an intrusion is justified, the officers executing the search are "placed in control of the premises." *Bills* recognized, however, that

such control does not authorize law enforcement officers to invite third parties on the premises for reasons unrelated to law enforcement. *Id.* The warrant therefore does not justify the media intrusion here, because the officers invited the media for newsgathering, not for law enforcement.

The district court's reasoning is even more problematic insofar as it was applied to the media's entry into the Berger home, a place that the government did not have a warrant to search. Although Mr. Berger consented to Agent Scrafford's initial entry into the home, he never consented to the entry of the media-owned microphone that Agent Scrafford wore. In addition, the media could not have benefitted derivatively from the consent extended to Agent Scrafford, because without a warrant, Agent Scrafford was not in control and possession of the home, and therefore, had no valid authority to supply the requisite consent.

The media's contention that their entry was impliedly consented to by "custom and usage," is also unavailing. *See Florida Pub. Co. v. Fletcher*, 340 So.2d 914 (Fla. 1977) (implying consent from a longstanding "custom and usage" of permitting the media to enter private property where a conflagration had consumed a house, causing death, and where the Florida Supreme Court characterized the fire as "a disaster of great public interest," and a "calamity"). *Fletcher* involved a disaster, which this case does not. Other courts have similarly distinguished *Fletcher* on its facts. *See Prahl*, 295 N.W.2d at 779, *WROC-TV*, 441 N.Y.S.2d at 223.

Although neither the district court nor this court has exhaustively researched Montana trespass law, we have no reason to believe it departs from the generally recognized principles we have discussed. We therefore remand for the district court's further consideration of the Bergers' claim for trespass against the media.

Conversion

The Bergers sued the media appelees for conversion on the basis of the media's capture of their images and voices. The district court found that recorded sounds and images cannot be the subject of a conversion claim. We agree.

To make out a valid conversion claim under Montana law, a plaintiff must prove that (1) he owns the property converted, (2) has a right to its possession, (3) the converter exercised unauthorized dominion over that property, and (4) the property owner has suffered damages as a result of the conversion. *Eatinger v. Johnson*, 887 P.2d 231, 234 (Mont. 1994) (citation omitted). The Bergers' images and sounds are intangible, and intangible property interests have not traditionally been subject to conversion. *See* Prosser & Keeton, Law of Torts § 15 (5th ed. 1985); Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 101[B](1)(i) (1995) ("The torts of conversion and trespass relate to interference with tangible rather than intangible property. . . ."). Although the common law rule has been relaxed somewhat, and the tort may now reach the misappropriation of intangible rights customarily merged in or identified with some document, it has not yet been extended further. *See Restatement* (Second) of Torts, § 242 and comments; *Hurst v. Dezer/Reyes Corp.*, 82 F.3d 232, 236 (8th Cir. 1996) (holding that even under the "expanded definition of the tort" under New York law, the business concept and appearance of a diner could not be "converted" since the claimed property rights were not rights customarily merged in a document; *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 457 (Ohio 1976) ("it has never been held that one's countenance or image is 'converted' by being photographed"). No Montana court has recognized a cause of action for the "conversion" of sounds and images. The Bergers, therefore, have not stated a claim for conversion.

Intentional Infliction of Emotional Distress

Under Montana law, this cause of action may arise "if there was serious or severe emotional distress to the plaintiff which was a reasonable foreseeable consequence of the defendant's negligent or intentional act or omission." *See Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 429 (1995).

The district court rejected this claim on the ground that it had already found that none of the media appellees' acts were unlawful, and therefore, emotional distress could not have been a reasonably foreseeable consequence of their actions.

In light of our holding that the Bergers have alleged a claim of interference with both their privacy and their property interests, we also remand this claim to the district court for reconsideration upon a fully developed record.

INJUNCTION

The Bergers also sought an injunction preventing the media appellees from further broadcast of any or all parts of the video and sound gathered during the search. We agree with the district court that this is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." *CBS, Inc. v. Davis*, 510 U.S. 1315, 114 S. Ct. 912, 914 (1994) (Blackmun, Circuit Justice, staying preliminary injunction) (citations omitted). Even though the Bergers have alleged triable claims for damages arising out of the manner in which the media appellees obtained the material, such allegations are not sufficient to support the imposition of an injunction. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publication of the Pentagon Papers).

CONCLUSION

We reverse the district court's judgment in favor of the federal appellees in the Bergers' *Bivens* claim, and also reverse the judgment in favor of the media appellees on that claim. We also reverse and remand the judgment in favor of the media appellees on the Bergers' state law claims for trespass and intentional infliction of emotional distress, but otherwise affirm the judgment of the district court.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART for further proceedings. Costs are awarded to Appellants.

APPENDIX B

[Filed Feb. 26, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV-95-46-BLG-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs,

vs.

RODNEY HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELL, ROBERT PRIEKSAT, KRIS A. MCLEAN, TURNER BROADCASTING SYSTEMS, INC., a Georgia corporation, ROBERT RAINEY, DONALD HOOPER, and UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM AND ORDER

Pending before this Court is the federal defendants' motion to dismiss or, in the alternative, for summary judgment. The "federal defendants" as referred to in this order are United States Department of Interior's Fish and Wildlife Service (FWS) Special Agents Hanlon, Scrafford, Branzell, and Prieksat, and Assistant United States Attorney (AUSA) McLean. Incorporated in the federal defendants' motion is a request that this Court take judicial notice of the information filed May 5, 1993 in *United States v. Paul W. Berger*, and of excerpts from testimony given by Special Agent Joel Scrafford in the matter. Also pending is the motion for summary judgment filed by defendants Turner Broadcasting Systems, Inc. (TBS), Robert Rainey (Rainey), and Donald Hooper (Hooper).

Rainey and Hooper were members of the Cable News Network (CNN) camera crew which filmed the execution of the search warrant. After hearing oral arguments and reviewing the briefs, this Court is prepared to rule on the motions.

BACKGROUND

The plaintiffs in this case are Garfield County ranchers Paul W. Berger (Berger) and his wife Erma R. Berger (Mrs. Berger). An investigation was initiated after former employees of Berger contacted Montana Fish and Game Service officials alleging that Berger used poisons to kill predators on his ranch, including eagles. In connection with the investigation of Berger, the FWS obtained a search warrant for the Berger ranch. This action arises from the March 24, 1993 execution of that federal search warrant by FWS agents.

Sometime prior to the execution of the warrant, CNN was given permission to accompany the government while agents executed the search warrant. The CNN crew accompanied federal and state agents during the execution of the search warrant. CNN later broadcast a news story about ranchers killing predators. The investigation and prosecution of Berger were featured in the story. On March 21, 1995, this lawsuit was filed. The Bergers allege that in executing the search warrant, federal defendants and defendants TBS, Rainey, and Hooper violated their Fourth Amendment right to be free from unreasonable searches and seizures. Additionally, the Bergers allege trespass against TBS, Rainey, Hooper and AUSA McLean; conversion against TBS, Rainey and Hooper; intentional infliction of emotional distress against TBS, Rainey, and Hooper; and a violation of the federal wiretapping statute, 18 U.S.C. § 2511, against TBS, Rainey and Hooper.

I. *The federal defendants' Motion to Dismiss or, in the alternative, for Summary Judgment.*

Standard of Review

When deciding a motion for summary judgment, the Court generally looks to whether material issues of fact are in dispute. Fed.R.Civ.P. 56(e). However, when the summary judgment motion is based on qualified immunity, a court must consider the law as it was established at the time of the incident. *Romero v. Kitsap County*, 931 F.2d 624, 628 (9th Cir. 1991).

The defense of qualified immunity applies to government officials and protects all "but the plainly incompetent or those who knowingly violate the law." *Schroeder v. McDonald*, 55 F.3d 454, 461 (1995) (citations omitted). Even officials who violate the Constitution are to be accorded qualified immunity and, therefore, escape money damages if, in their performance of discretionary duties, their actions do not violate "clearly established constitutional or statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Elder v. Holloway*, 114 S. Ct. 1019, 1021 (1994). Under the summary judgment standard for qualified immunity, the Court must determine if the plaintiff has alleged a violation of law that was clearly established at the time of the alleged violation. *See Romero*, 931 F.2d at 627-28. If the law was not clearly established, then the official is immune from suit as a matter of law, any factual disputes are rendered immaterial, and summary judgment is appropriate. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Romero*, 931 F.2d at 628. The determination of whether an asserted federal right was clearly established at a particular time is a question of law. *Elder*, 114 S. Ct. at 1023.

Therefore, the qualified immunity test essentially requires the following three steps: 1) the identification of the specific right allegedly violated; 2) the determination of whether that right was so "clearly established" that a reasonable officer would have been aware of it; and 3) the determination of whether a reasonable officer could have believed that the conduct at issue was lawful. *Romero*, 931 F.2d at 627.

The question to be answered in this case is whether on March 24, 1993 it was clearly established that the Bergers' Fourth Amendment freedom from unreasonable searches and seizures was violated when government agents executing a valid search warrant allowed representatives of the news media to observe and document the search. The contours of the right must have been sufficiently clear in 1993 that a reasonable official would have understood that what he was doing violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In light of pre-existing law, the unlawfulness of the act must have been apparent. *Id.* If the law was not clearly established, then summary judgment must be granted.

Discussion

A. *Motion for Summary Judgment*

In their motion, defendants ask the Court for an order finding that federal law enforcement agents who allowed a news media camera crew to accompany them during the execution of a valid search warrant did not violate any clearly established Fourth Amendment rights and that, therefore, they are entitled to qualified immunity. *See Harlow*, 457 U.S. at 818 (if law was not "clearly established" at time of incident, then summary judgment is proper). The Bergers contend that it was clearly established at the time of the search that it is a violation of the Fourth Amendment to allow a media camera crew at

the execution of a search warrant for reasons other than a legitimate law enforcement purpose.

The operation of the *Harlow* qualified immunity standard greatly depends upon the level of generality in which the relevant "legal rule" is identified. *Anderson*, 483 U.S. at 639; *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993). A plaintiff who has a suit based upon a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. *Anderson*, 483 U.S. at 639. The *Anderson* Court noted as an example of abstract rights that "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Anderson*, 483 U.S. at 639. The right referred to by the *Harlow* test is not a general constitutional guarantee, but rather it is the application in a particular context. *See Todd v. United States*, 849 F.2d 365, 370 (9th Cir. 1988).

The *Harlow* standard is an objective inquiry. *Kirkpatrick v. Los Angeles*, 803 F.2d 485, 490 (9th Cir. 1986). A plaintiff seeking damages from a government official bears the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the officer's allegedly unlawful act. *See e.g., Shoshone-Bannock Tribes v. Fish & Game Comm'n of Idaho*, 42 F.3d 1278, 1285 (9th Cir. 1994); *Davis v. Scherer*, 468 U.S. 183, 197 (1984). In deciding whether the law was clearly established at the relevant time, the court must "survey the legal landscape" as it existed at the time of the conduct in question. *Figueroa v. United States*, 7 F.3d 1405, 1409 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1537 (1994); *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989), *cert. denied* 498 U.S. 938 (1990).

The survey of the legal landscape begins by examining the binding Supreme Court and Ninth Circuit decisions. *Kirkpatrick*, 803 F.2d at 490. In the absence of binding Supreme Court or Ninth Circuit precedent, courts in this circuit reviewing a qualified immunity defense must look to all available decisional law, including cases from other state, circuit, and district courts. *Figueroa*, 7 F.3d at 1409; *Wood*, 879 F.2d at 591. The analysis begins by examining those cases that are "most like" the instant case. *Figueroa*, 7 F.3d at 1409. Finally, because the question is whether the relevant law was so clearly established at the time of the conduct at issue that a reasonable officer could be said to "know" his conduct was unlawful, post-incident decisions may not be considered. *See Harlow*, 457 U.S. at 818-19; *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989).

The Bergers attempt to satisfy their burden of demonstrating that the constitutional rights at issue were clearly established by relying on *United States v. Sanusi*, 813 F. Supp. 149, 157-59 (E.D.N.Y. 1992), and *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994). The *Ayeni* case arose from the search underlying the *Sanusi* case. Both cases, however, can be distinguished.

The *Sanusi* case involved the news-gathering privileges of the media and whether the media had to turn over to the defendent a videotape taken at the execution of a search warrant. The case did not involve the question of qualified immunity.

The district court in *Ayeni* was affirmed by the Second Circuit in *Ayeni v. Mottola*, 35 F.3d 680 (1994), *cert. denied*, 115 S. Ct. 1689 (1995). The *Ayeni* case is distinguishable because the Second Circuit Court allowed the plaintiff to defeat the rule of qualified immunity by addressing and analyzing the alleged violation of an extremely abstract right. Unlike the search in the case at bar, the *Ayeni* case involved the search of a home, where

privacy interests are at their greatest. The *Ayeni* Court addressed the general Fourth Amendment right to privacy and held that the right had been violated when a news crew entered the house during the execution of a search warrant. *Ayeni*, 35 F.3d at 686.[1] The Sixth Circuit and this Court recognize the error made by the Second Circuit. *See Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995) (criticizing the *Ayeni* Court for describing the violation in abstract and general terms, contrary to the Supreme Court's instructions in *Anderson*).

Additionally, the *Ayeni* case was decided subsequent to the Berger search. Therefore, the holding in the case should not be considered in determining whether the law was clearly established at the time the events at issue occurred. *See Baker*, 887 F.2d at 187 (post-incident decisions cannot clearly establish the law at the time of the conduct in question).

Furthermore, citing to *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982), and *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980), the Bergers assert that existing case law establishes that it is unconstitutional for officers to delegate their authority or to bring private persons along to execute warrants unless the private persons are necessary to provide reasonable assistance in the execution of the warrant. Both of these cases, however, involved persons who actively participated with the officers in a search for evidence. These cases demonstrate only

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[1] In analyzing the general Fourth Amendment right instead of the specific application of that right, the *Ayeni* Court stated that it has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties. The court concluded that a special agent exceeded those well-establishd principles when he brought into the plaintiff's home a television news crew that was neither authorized by the warrant nor serving any legitimate law enforcement purpose. *Ayeni*, 35 F.3d at 686.

that at the time of the Berger search the Fourth Amendment did not prohibit the use of a third party at a search if that party was aiding the officer in searching for items either specified in the warrant or within plain view of those items specified. *See Wright*, 667 F.2d at 797 (officer executing a warrant that authorized seizure of driver's license may utilize assistance of law enforcement officer involved in separate narcotics conspiracy investigation involving same people); *Clouston*, 623 F.2d at 486-87 (presence of telephone company employee, who was used to identify equipment reasonably believed to be found near equipment specified in warrant, did not render search unconstitutional). The cases did not involve the question of the lawfulness of allowing media representatives to observe and document the searching officers' own execution of a warrant. In fact, the media was not involved in either case.

Finally, in a supplemental filing, the plaintiffs presented the case of *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) in support of their position. The *Buonocore* decision is distinguishable because the case involved law enforcement officers inviting a private person to engage in an independent general search of the home for items never mentioned in the warrant. *Buonocore*, 65 F.3d at 350. Furthermore, although the search in *Buonocore* took place late in 1992, the decision was rendered years after the 1993 Berger search.

The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

The federal defendants cite to several cases to demonstrate that decisional law did not "clearly establish" the proposition that government agents executing a warrant violated constitutional rights by allowing media representatives to attend and observe. For example, in *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984), the Court found that officers did not violate the Fourth Amendment when they told the media what time the search would be executed and then refused to make the media leave during the execution of the warrant, even though the property owner asked that they be removed. The federal defendants also cite two unpublished district court cases, *Higbee v. Times-Advocate*, 5 Med. L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980) and *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984). In both cases, summary judgment was entered in favor of defendants who allowed media coverage at the execution of a search warrant.

Another case cited by the federal defendants, *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980), was dismissed when police allowed a reporter, who learned about the search on the police scanner, to observe the search. The court stated that it was uwilling to accept the proposition that an otherwise reasonable search would be made unreasonable by the filming and television broadcast of the search. *Id.* at 774.

The Bergers attack these cases because two are unpublished, the other is a state court case, and none are authoritative. But, the cases cited by the federal defendants help demonstrate that courts (and officers) were lacking

clear authority on this issue at the time of the Berger search.

In addition to case law, the Bergers also rely on 18 U.S.C. § 3105, which identifies who may serve search warrants. The Bergers argue that the statute provides guidance on the constitutional issue of what constitutes "reasonableness" under the Fourth Amendment. The statute provides:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (1985).

The case at bar does not involve a situation in which CNN was helping to serve or execute the warrant. CNN was simply observing the agents who were serving the warrant. The statute prevents officers who obtain a warrant from using the warrant themselves or allowing others to use the warrant as a means of expanding an otherwise valid and judicially-approved search into a general search for things not specified in the warrant. Neither 18 U.S.C. § 3105 on its face nor pre-March 1993 case law interpreting the statute clearly establish that the presence of a news crew, or any other third person observer not actively participating in a search or seizure, violates the Fourth Amendment.

The mere fact that later cases may have extended pre-existing legal principles in a way that makes the defendants' conduct unlawful does not mean that the unlawfulness of that conduct was "clearly established" at the time of the search. *See Mitchell v. Forsyth*, 472 U.S. 511, 530-35 (1985). When "all available decisional law" at the relevant time is considered, the most that can be said of the legal landscape as it stood in March 1993 is

that the law was perhaps beginning to evolve toward the view that the Fourth Amendment may prohibit the presence of media observers during the execution of a valid search warrant. This Court finds that the law was not clearly established in March 1993 and, therefore, the FWS agents and AUSA McLean are entitled to qualified immunity.

II. *Motions for Judicial Notice*

In addition to their brief and statement of uncontroverted facts in support of their motion, the federal defendants rely on the Certification of Scope of Employment as prepared by Helene M. Goldberg, Director of the Torts Branch, Civil Division, United States Department of Justice. The Bergers do not oppose the defendants' motion that this Court take judicial notice of the certification. The Court grants the defendants' request for certification.

The federal defendants also ask this Court to take judicial notice of certain materials from the proceedings in the matter of *United States v. Paul W. Berger, No.* CR 93-46-BLG-RWA (D. Mont.). Specifically, they ask that notice be taken of the information filed May 5, 1993, and of excerpts from testimony given August 11, 1993 by Special Agent Joel Scrafford in the same matter. The defendants hardily contest the motion. The Court did not rely on the material in determining whether the law at issue was clearly established at the time of the Berger search. However, the Court did not consider the motion for judicial notice on its merits. The motion is moot.

III. *The defendants' (TBS, Rainey, and Hooper) motion summary judgment.*

The defendants TBS, Rainey, and Hooper are moving this Court for summary judgment. TBS is engaged in the business of broadcasting entertainment, news and information programs. Rainey and Hooper are agents of CNN

and served on the camera crew during filming of the execution of the Berger search.

Standard of Review

First, the Court finds it instructive to review the standards applicable to motions for summary judgment. Fed.R.Civ.P. 56(c) states summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must initially identify those portions of the record before the Court which it believes establish an absence of material fact. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv.*, 809 F.2d at 630 (*citing, Liberty Lobby*, 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *Id.*

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475

U.S. 574, 587 (1986). Thus, the Court's ultimate inquiry is whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *Id.* at 631. Having so stated, the Court now turns to the merits of the pending motion.

Discussion

The defendants TBS, Rainey, and Hooper (the media defendants) move for summary judgment on four grounds. First, the media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. Second, they argue that as a matter of law, there is no constitutional, statutory or common law liability for recording voluntary conversations with law enforcement officers or videotaping areas outside the family residence. Third, they allege that the Bergers have failed to plead or otherwise satisfy the standards required under the First Amendment for the requested injunction. Finally, the media defendants allege that the Bergers cannot fulfill the requirements for their common law theories.

A. *Collateral Estoppel*

The media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. The Bergers, however, argue that the action is not barred because the issues in the two cases are different. Specifically, the plaintiffs assert that the Fourth Amendment was not previously adjudicated, that TBS's involvement was not considered, and that Mrs. Berger was not a party.

The Bergers' arguments are not persuasive. CNN and TBS shared the same role in the search; they are essentially one in the same. Consideration of CNN's involve-

ment in the prior suit is essentially consideration of TBS's involvement. The same argument holds true for Mrs. Berger. She is in privity with Mr. Berger. She held the same position as Mr. Berger and went through the same experience. If his rights were not violated, her rights were not violated.

In the criminal case against Berger, the defendant sought to suppress evidence obtained in the search on the basis that his Fourth Amendment rights had been violated. *United States v. Paul W. Berger*, CR 93-46-BLG-RWA (D.Mont. 1993). Berger argued that the search was illegal. Magistrate Judge Anderson held a full hearing on these issues. Because the search conducted at the ranch did not violate the Fourth Amendment, Magistrate Judge Richard W. Anderson denied the suppression motion. In the case at bar, the plaintiffs are again arguing that their Fourth Amendment rights were violated by the search.

Magistrate Judge Anderson's holding in the criminal case, however, bars a *Bivens* action in this case. *See Matthews v. Macanas*, 990 F.2d 467, 468 (9th Cir. 1993) (if a court in a criminal case holds that a search warrant is supported by probable cause and constitutional rights were not violated, a subsequent *Bivens* civil action is barred by collateral estoppel); *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991) (plaintiff estopped from bringing a civil action because issue determined in criminal case), *cert. denied*, 502 U.S. 1091 (1992). A *Bivens* action authorizes a cause of action against persons, acting under color of federal law, for violations of constitutional rights. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Because the constitutionality of the search has already been litigated, the causes of action based on the constitutionality of the search are barred by collateral estoppel.[2]

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[2] The videotaping of an execution of a valid search and seizure warrant does not render an otherwise reasonable search and seizure

The Bergers' Fourth Amendment claims against the media defendants arising from the videotaping of various places on the ranch also fail because the media defendants were not acting under color of law when they filmed the execution of the search. When a private party, such as TBS, is present during a search as a means of furthering its own interests, it is not acting under color of federal law and is not liable under *Bivens*. *See United States v. Miller*, 688 F.2d 652, 657-58 (9th Cir. 1982); *United States v. Jennings*, 653 F.2d 107, 110 (4th Cir. 1981). In this case, the defendants were not acting under the color of federal law.[3]

B. *Federal wiretap statutes*

The Bergers claim that the media defendants "intercepted" their communications with the federal officers in violation of the Wiretap Act. The media defendants are entitled to summary judgment on the wiretap claims because the federal agents consented to the recording.

The Wiretap Act prohibits the intentional interception of certain communications, but expressly allows persons to intercept and record communications under certain other conditions. Section 2511(2)(d) of the Act provides in pertinent part that:

> [i]t shall not be unlawful . . . for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the

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unreasonable. *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980).

[3] To establish a *Bivens* action, the Bergers must prove that the media defendants (1) acted under the color of federal law and (2) deprived them of constitutionally protected rights. Because this Court determined that one prong was not met, this Court need not analyze the second prong.

> purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (1970 & Supp. 1995).

The statute specifically provides that it is not unlawful to intercept oral communication where one of the parties has given prior consent. In the case at bar, law enforcement consented to TBS recording the conversations. The exception to this statute does not apply because this Court does not find that the media defendants made the recordings for the purpose of committing a crime or tortious act. Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain. Since the Act provides that there is no liability to a third party if one party to the conversation consents to the third party recording and since the exception does not apply, the media defendants did not violate the Wiretap Act. *See, e.g., Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995) (wiretap statutes allow one party to have conversation recorded unless his purpose is to commit a crime or tort); *United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993) (no violation of Fourth Amendment where one party consented to the monitoring of wire communications), *cert. denied* 114 S.Ct. 556 (1993).

C. *Request for Injunction*

The Bergers seek an injunction preventing TBS, Rainey, and Hooper from broadcasting or selling all or part of the videotape and recordings gathered during the search. They make this request though the segment has already been broadcast several times and has not aired in more than a year.

The request is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." *CBS, Inc. v. Davis*, 114 S. Ct. 912, 914

(1994) (citations omitted). The term "prior restraint" is used to describe administrative and judicial orders issued in advance of the time that communications are to occur and forbidding that those communications occur. *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993). While the prohibition against prior restraints is not absolute, the gagging of publication has been considered acceptable only in "exceptional cases." *CBS*, 114 S. Ct. at 914.

The plaintiffs have not shown that this case is an exceptional case that would justify the imposition of a prior restraint.

D. *Common law Claims*

The Bergers have pled several state law claims against TBS, Rainey and Hooper, including conversion, trespass, and intentional infliction of emotional distress.[4]

1. *Conversion*

In their conversion count, the plaintiffs allege that the media defendants intentionally and wrongfully entered the Berger Ranch and wrongfully seized and appropriated both statements and private images of the Bergers, their premises, and possessions. The media defendants contend that the images and voices cannot be the subject of a conversion action.

The elements necessary for a conversion action in Montana include ownership of property, a right of possession, unauthorized dominion over that property by another, and damages that result. *Eatinger v. Johnson*, 887 P.2d 231,

[4] The amended complaint also pled a claim of trespass against AUSA McLean. The United States was later substituted as the sole defendant for the claim of trespass against AUSA McLean pursuant to the Federal Employees Liability Reform and Tort Compensation Act. The claim against the United States for trespass was recently dismissed without prejudice by this Court in its December 15, 1995 and December 20, 1995 Orders.

234 (Mont. 1995). The Ninth Circuit has held that three criteria must be met before the law will recognize a property right. First, there must be an interest capable of precise definition. Second, that interest must be capable of exclusive possession or control. Finally, the putative owner must have established a legitimate claim to exclusivity. *Rasmussen & Assocs. Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 903 (9th Cir. 1992), *cert. denied* 113 S.Ct. 2927 (1993).

The Montana Supreme Court has never held that recorded sounds and images can be the subject of a conversion action. Other courts however have concluded that they cannot. *See, e.g., Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 (9th Cir. 1988) (use of one's photographic image is not proper grounds for conversion action), *cert. denied* 489 U.S. 1080 (1989); *Zacchinin v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 457 (Ohio 1976) (one's image is not converted by being photographed), *rev'd on other grounds*, 433 U.S. 562 (1977); *Ippolito v. Lennon*, 542 N.Y.S.2d 3, 6 (N.Y. App. Div. 1989) (any possible interest by musician in his performance contained on video and sound recording is intangible and not actionable as conversion). *See also, FMC Corp. v. Capital Cities/ABC*, 915 F.2d 300, 303 (7th Cir. 1990) (retaining copies of documents not sufficient to constitute conversion). This Court agrees with those courts that have found that the use of photographed or videotaped images and sound recordings does not give rise to a cause of action for conversion.

Conversion requires the intentional exercise of dominion and control over a chattel. *Ault v. Hustler Magazine, Inc.*, 860 F.2d at 883. The Bergers assert that the twenty-two tapes containing the images and statements of the Bergers are tangible chattel giving rise to the conversion action. The plaintiffs' argument was rejected by the Ninth Circuit in *Ault*. The *Ault* Court held that the photographs were the property of the photographer, not of the person

photographed. *Id.* While the tapes may be viewed as tangible chattel, it is the chattel of the defendants, not of the Bergers. Therefore, there was no conversion of Berger's chattels. *Id.*

2. *Trespass*

The Bergers also allege that the media defendants trespassed when they entered the Berger ranch to observe the execution of the search warrant. Consent of the owner, possessor, or another authorized to consent, however, is an absolute defense to trespass. *See Salisbury Livestock Co. v. Credit Union*, 793 P.2d 470, 475 (Wyo. 1990).

In this case, the federal government had temporary control and possession of the property while executing the search warrant. CNN had the permission of the federal government to be present during the execution of the search warrant.[5] The plaintiffs' amended complaint acknowledges that permission was given by the government. The letter from CNN to AUSA McLean dated March 11, 1993 was sent to confirm that permission. (Pl's Statement of Facts, Exhibit A).

Furthermore, the media defendants did not invade the property interests protected by the tort of trespass. *See Desnick*, 44 F.3d at 1352. The execution of the warrant was not disrupted by the presence of the media. The media was present for the purpose of news coverage only. In this case, the recorded transcript from CNN submitted by the plaintiffs, along with their attorney's affidavit in response to this motion, does not reveal that the crew was asked to leave, even though Mr. Berger apparently acknowledged that his picture was being taken. (Lansing's

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[5] This Court has already ruled that the government agents have qualified immunity for their actions in allowing the media to accompany them. The media's reliance on that permission was not unreasonable.

Aff., Ex. 8 at tape 08 page 13). Furthermore, any argument that the Bergers did not know the crew was a news crew is not dispositive. "[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent." *Desnick*, 44 F.3d at 1351.

This Court finds that the media defendants are not liable under a cause of action for trespass.

3. *Intentional Infliction of Emotional Distress*

Finally, the Bergers allege a cause of action for intentional infliction of emotion distress. Montana allows a separate cause of action alleging intentional infliction of emotional distress. *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411 (1995). This independent cause of action may arise if there was serious or severe emotional distress to the plaintiff which was a reasonably foreseeable consequence of the defendant's negligent or intentional act or omission. *Sacco*, 896 P.2d at 429. It is a question of law whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress. *Sacco*, 896 P.2d at 427.

This Court has already found that the media defendants did not trespass when they accompanied the government during the execution of the search warrant. They are also not liable for recording conversations during the search or for capturing videotaped images of plaintiffs. Furthermore, the media defendants are not liable for broadcasting a truthful, newsworthy story. Since no tortious conduct took place, emotional distress was not a reasonably foreseeable consequence of their actions. The Bergers' intentional infliction of emotion distress claim fails.

E. Declaratory Judgment

The Bergers are asking for declaratory judgment declaring essentially that the federal agents and the media defendants violated the Bergers' constitutional rights. The declaratory relief sought is redundant of the claims already addressed in this opinion.

Courts generally recognize two criteria for determining whether declaratory relief is appropriate: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Eureka Fed. Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa.*, 873 F.2d 228, 231 (9th Cir. 1989) (citations omitted). In light of this opinion, the declaratory judgment requested by the Bergers is not warranted.

Accordingly,

IT IS ORDERED:

1. The federal defendants' motion for summary judgment is granted.

2. The federal defendants' request for judicial notice of the Certification of Scope of Employment is granted.

3. The federal defendants' request for judicial notice is moot.

4. The media defendants' motion for summary judgment is granted.

5. In light of these rulings, the plaintiffs' motion to set preliminary pretrial conference is denied as moot.

6. The Clerk of Court shall forthwith enter summary judgment in favor of the defendants and against the plaintiffs.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and DATED this 26th day of February, 1996.

/s/ Jack D. Shanstrom
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 94-46-BLG-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs,

vs.

CABLE NEWS NETWORK, INC.,
a Georgia corporation,
and JACK HAMANN,
Defendants.

MEMORANDUM AND ORDER

Pending before this Court is a motion for summary judgment by defendants Cable News Network, Inc. (CNN) and Jack Hamann. CNN is engaged in the business of broadcasting entertainment, news and information programs. Jack Hamann is a reporter working for CNN and was present during the filming of the execution of the Berger search. The Court has heard oral arguments on the motion and has considered the submitted briefs. For the reasons set forth below, the motion is granted.[1]

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[1] The Bergers have a related case pending in this Court against federal officials and other media defendants, CV 95-46-BLG-JDS. The motion before the Court today is practically identical to the motion for summary judgment filed by the media defendants in the related case. The briefing and theories are identical except for changes in the party names. For this reason, this opinion and the opinion written in that case are essentially the same except for the party names.

BACKGROUND

The plaintiffs in this case are Garfield County ranchers Paul Berger (Berger) and his wife Erma Berger (Mrs. Berger). An investigation was initiated after former employees of Berger contacted Montana Fish and Game Service officials alleging that Berger used poisons to kill predators on his ranch, including eagles. In connection with the investigation of Berger, the FWS obtained a search warrant for the Berger ranch. This action arises from the March 24, 1993 execution of that federal search warrant by FWS agents.

Sometime prior to the exeution of the warrant, CNN was given permission to accompany the government while agents executed the search warrant. The CNN crew accompanied federal and state agents during the execution of the search warrant. CNN later broadcast a news story about ranchers killing predators. The investigation and prosecution of Berger were featured in the story. The Bergers bring this action alleging that in executing the search warrant, CNN and Jack Hamann violated their Fourth Amendment right to be free from unreasonable searches and seizures. They also allege that the defendants violated the Federal Wiretapping Act. Finally, the Bergers allege trespass, conversion, and intentional infliction of emotional distress against the defendants. This case was removed from the District Court of the Sixteenth Judicial District of the State of Montana, Garfield County on April 22, 1994.

STANDARD OF REVIEW

First, the Court finds it instructive to review the standards applicable to motions for summary judgment. Fed.R.Civ.P. 56(c), states summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must initially identify those portions of the record before the Court which it believes establish an absence of material fact. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv.*, 809 F.2d at 630 (*citing, Liberty Lobby*, 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *Id.*

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, the Court's ultimate inquiry is whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *Id.* at 631. Having so stated, the Court now turns to the merits of the pending motion.

DISCUSSION

The defendants CNN and Hamann move for summary judgment on four grounds. First, they claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. Second, they argue that as a matter of law, there is no constitutional, statutory, or common law liability for recording voluntary conversations with law enforcement officers or videotaping areas outside the family residence. Third, CNN and Hamann argue that the Bergers have failed to plead or otherwise satisfy the standards required under the First Amendment for the requested injunction. Finally, they contend that the Bergers cannot fulfill the requirements for their common law theories.

A. *Collateral Estoppel*

CNN and Hamann claim that the Berger's constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. The plaintiffs, however, argue that the action is not barred because the issues in the two cases are different. Specifically, the Bergers assert that the Fourth Amendment was not previously adjudicated, that CNN's involvement was not considered, and that Mrs. Berger was not a party.

The Bergers' arguments are not persuasive. CNN and TBS shared the same role in the search; they were essentially one in the same. Consideration of CNN's involvement in the prior suit is essentially consideration of TBS's involvement. The same argument holds true for Mrs. Berger. She is in privity with Mr. Berger. She held the same position as Mr. Berger and went through the same experience. If his rights were not violated, her rights were not violated.

In the criminal case against Berger, the defendant sought to suppress evidence obtained in the search on the basis that his Fourth Amendment rights had been violated.

United States v. Paul W. Berger, CR 93-46-BLG-RWA (D.Mont. 1993). Berger argued that the search was illegal. Magistrate Judge Anderson held a full hearing on these issues. Because the search conducted at the ranch did not violate the Fourth Amendment, Magistrate Judge Richard W. Anderson denied the suppression motion. In the case at bar, the plaintiffs are again arguing that their Fourth Amendment rights were violated by the search.

Magistrate Judge Anderson's holding in the criminal case, however, bars a *Bivens* action in this case. *See Matthews v. Macanas*, 990 F.2d 467, 468 (9th Cir. 1993) (if a court in a criminal case holds that a search warrant is supported by probable cause and constitutional rights were not violated, a subsequent *Bivens* civil action is barred by collateral estoppel); *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991) (plaintiff estopped from bringing a civil action because issue determined in criminal case), *cert. denied*, 502 U.S. 1091 (1992). A *Bivens* action authorizes a cause of action against persons, acting under color of federal law, for violations of constitutional rights. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Because the constitutionality of the search has already been litigated, the causes of action based on the constitutionality of the search are barred by collateral estoppel.[2]

The Bergers' Fourth Amendment claims against CNN and Hamann arising from the videotaping of various places on the ranch also fail because neither CNN nor Hamann were acting under color of law when they filmed the execution of the search. When a private party, such as CNN, is present during a search as a means of furthering its own interests, it is not acting under color of fed-

[2] The videotaping of an execution of a valid search and seizure warrant does not render an otherwise reasonable search and seizure unreasonable. *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980).

eral law and is not liable under *Bivens*. *United States v. Miller*, 688 F.2d 652, 657-58 (9th Cir. 1982); *United States v. Jennings*, 653 F.2d 107, 110 (4th Cir. 1981). In this case, CNN and Hamann were not acting under the color of federal law.[3]

B. *Federal wiretap statutes*

The Bergers claim that CNN and Hamann "intercepted" their communications with the federal officers in violation of the Wiretap Act. The defendants are entitled to summary judgment on the wiretap claims because the federal agents consented to the recording.

The Wiretap Act prohibits the intentional interception of certain communications, but expressly allows persons to intercept and record communications under certain other conditions. Section 2511(2)(d) of the Act provides in pertinent part that:

> [i]t shall not be unlawful . . . for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (1970 & Supp. 1995).

The statute specifically provides that it is not unlawful to intercept oral communication where one of the parties has given prior consent. In the case at bar, law enforcement consented to CNN recording the conversations. The

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[3] To establish a *Bivens* action, the Bergers must prove that the media defendants (1) acted under the color of federal law and (2) deprived them of constitutionally protected rights. Because this Court determined that one prong was not met, this Court need not analyze the second prong.

exception to this statute does not apply because this Court does not find that defendants made the recordings for the purpose of committing a crime or tortious act. Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain. Since the Act provides that there is no liability to a third party if one party to the conversation consents to the third party recording and since the exception does not apply, neither CNN nor Hamann violated the Wiretap Act. *See, e.g., Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995) (wiretap statutes allow one party to have conversation recorded unless his purpose is to commit a crime or tort); *United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993) (no violation of Fourth Amendment where one party consented to the monitoring of wire communications), *cert. denied* 114 S. Ct. 556 (1993).

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The Bergers seek an injunction preventing CNN and Hamann from broadcasting or selling all or part of the videotape and recordings gathered during the search. They make this request though the segment has already been broadcast several times and has not aired in more than a year.

The request is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." *CBS, Inc. v. Davis*, 114 S. Ct. 912, 914 (1994) (citation omitted). The term "prior restraint" is used to describe "administrative and judicial orders issued in advance of the time that communications are to occur and forbidding that those communications occur." *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993) (citation omitted). While the prohibition against prior restraints is not absolute, the gagging of publication has been considered acceptable only in "exceptional cases." *CBS*, 114 S. Ct. at 914.

The plaintiffs have not shown that this case is an exceptional case that would justify the imposition of a prior restraint.

D. *Common law Claims*

The Bergers have pled several state law claims against CNN and Hamann, including conversion, trespass, and intentional infliction of emotional distress.[4]

1. *Conversion*

In their conversion count, the plaintiffs allege that CNN and Hamann intentionally and wrongfully entered the Berger Ranch and wrongfully seized and appropriated both statements and private images of the Bergers, their premises, and possessions. CNN and Hamann contend that the images and voices cannot be the subject of a conversion action.

The elements necessary for a conversion action in Montana include ownership of property, a right of possession, unauthorized dominion over that property by another, and damages that result. *Eatinger v. Johnson*, 887 P.2d 231, 234 (Mont. 1995). The Ninth Circuit has held that three criteria must be met before the law will recognize a property right. First, there must be an interest capable of precise definition. Second, that interest must be capable of exclusive possession or control. Finally, the putative owner must have established a legitimate claim to exclusivity. *Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 903 (9th Cir. 1992), *cert. denied* 113 S. Ct. 2927 (1993).

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[4] The amended complaint also pled a claim of trespass against AUSA McLean. The United States was later substituted as the sole defendant for the claim of trespass against AUSA McLean pursuant to the Federal Employees Liability Reform and Tort Compensation Act. The claim against the United States for trespass was recently dismissed without prejudice by this Court in its December 15, 1995 and December 20, 1995 Orders.

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Conversion requires the intentional exercise of dominion and control over a chattel. *Ault v. Hustler Magazine, Inc.*, 860 F.2d at 883. The Bergers assert that the twenty-two tapes containing the images and statements of the Bergers are tangible chattel giving rise to the conversion action. The plaintiffs' argument was rejected by the Ninth Circuit in *Ault*. The *Ault* Court held that the photographs were the property of the photographer, not of the person photographed. *Id.* While the tapes may be viewed as tangible chattel, it is the chattel of the defendants, not of the Bergers. Therefore, there was no conversion of Berger's chattels. *Id.*

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The Bergers also allege that CNN and Hamann trespassed when they entered the Berger ranch to observe the execution of the search warrant. Consent of the owner,

possessor, or another authorized to consent, however, is an absolute defense to trespass. *See Salisbury Livestock Co. v. Credit Union*, 793 P.2d 470, 475 (Wyo. 1990).

In this case, the federal government had temporary control and possession of the property while executing the search warrant. CNN had the permission of the federal government to be present during the execution of the search warrant.[5] The plaintiffs' amended complaint acknowledges that permission was given by the government. The letter from CNN to AUSA McLean dated March 11, 1993 was sent to confirm that permission. (Pl.'s Statement of Facts, Ex. A).

Furthermore, the media defendants did not invade the property interests protected by the tort of trespass. *See Desnick*, 44 F.3d at 1352. The execution of the warrant was not disrupted by the presence of the media. The media was present for the purpose of news coverage only. In this case, the recorded transcript from CNN submitted by the plaintiffs, along with their attorney's affidavit in response to this moton, does not reveal that the crew was asked to leave, even though Mr. Berger apparently acknowledged that his picture was being taken. (Lansing's Aff., Ex. 8 at tape 08 page 13). Furthermore, any argument that the Bergers did not know the crew was a news crew is not dispositive. "[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent." *Desnick*, 44 F.3d at 1351.

This Court finds that neither CNN nor Hamann are liable under a cause of action for trespass.

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[5] This Court has already ruled in CV-95-46-BLG-JDS that the government agents have qualified immunity for their actions in allowing the media to accompany them. The media's reliance on that permission was not unreasonable.

3. *Intentional Infliction of Emotional Distress*

Finally, the Bergers allege a cause of action for intentional infliction of emotion distress. Montana allows a separate cause of action alleging intentional inflicton of emotonal distress. *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411 (1995). This independent cause of action may arise if there was serious or severe emotional distress to the plaintiff which was a reasonably foreseeable consequence of the defendant's negligent or intentional act or omission. *Sacco*, 896 P.2d at 429. It is a question of law whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress. *Sacco*, 896 P.2d at 427.

This Court has already found that CNN and Hamann did not trespass when they accompanied the government during the execution of the search warrant. They are also not liable for recording conversations during the search or for capturing videotaped images of plaintiffs. Furthermore, the defendants are not liable for broadcasting a truthful, newsworthy story. Since no tortious conduct took place, emotional distress was not a reasonably foreseeable consequence of their actions. The plaintiffs' intentional infliction of emotion distress claim fails.

E. *Declaratory Judgment*

The Bergers are asking for declaratory judgment declaring essentially that the defendants violated the Bergers' constitutional rights. The declaratory relief sought is redundant of the claims already addressed in this opinion.

Courts generally recognize two criteria for determining whether declaratory relief is appropriate: (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Eureka Fed. Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa.*, 873 F.2d 228, 231 (9th Cir. 1989) (citations

omitted). In light of this opinion, the declaratory judgment requested by the Bergers is not warranted.

Accordingly,

IT IS ORDERED:

1. The defendants' motion for summary judgment is granted.

2. The plaintiffs' motion to set a preliminary pretrial conference is denied as moot.

3. The Clerk of Court shall forthwith enter summary judgment in favor of the defendants and against the plaintiffs.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and DATED this 26th day of February, 1996.

/s/ Jack D. Shanstrom
United States District Judge

APPENDIX D

[Filed Feb. 25, 1998]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96-35251
DC No. CV-95-00046-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs-Appellants,

v.

RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA,
Defendants-Appellees,

No. 96-35266

DC No. CV-94-00046-JDS
(District of Montana)

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs-Appellants,

v.

JACK HAMANN; CABLE NEWS NETWORK, INC.,
a Georgia corporation,
Defendants-Appellees.

ORDER

Before: SCHROEDER and KLEINFELD, Circuit Judges, and BREWSTER*, District Judge.

The panel as constituted above has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

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* Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

Supreme Court, U.S.
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No. 97-1914

In The

Supreme Court of the United States

October Term, 1997

CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER and JACK HAMANN,

Petitioners,

v.

PAUL W. BERGER AND ERMA R. BERGER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Does the media engage in joint action in violation of the Fourth Amendment when the media conspire with a United States Department of Justice attorney and federal agents to enter private property and to film and to record private persons and conversations while federal agents execute a search warrant which does not authorize the presence or actions of the media?

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners Paul W. Berger and Erma R. Berger (the "Bergers") respectfully submit their opposition to the Petition for Writ of Certiorari filed by Media petitioners Turner Broadcasting System, Inc. ("Turner"), Cable News Network, Inc. ("CNN"), CNN correspondent Jack Hamann ("Hamann"), Robert Rainey ("Rainey"), and Donald Hooper ("Hooper") (collectively the "Media").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 129 F.3d 505 and entitled *Berger v. Hanlon*. App. 1a. The decisions of the District Court are unreported. App. 27a, 49a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on November 13, 1997, reversing in part and affirming and remanding in part, the District Court's dismissal of the Bergers' two related civil actions. The Media and Government defendant-appellees filed separate Petitions for Rehearing and Suggestion for Rehearing En Banc which were both denied on February 25, 1998.[1] App. 61a. The Media and Government filed Petitions for Writs of Certiorari which were both docketed on May 28, 1998. Justice Sandra Day O'Connor extended the time to oppose the Petitions until July 27, 1998. The Bergers filed a Conditional Cross-Petition to the Media Petition on June 29, 1998 pursuant to United States Supreme Court Rule 12.5. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] The Government petitioners are Assistant United States Attorney Kris McLean ("AUSA McLean"), United States Fish & Wildlife Service ("FWS") Speciai Agents Rodney C. Hanlon ("Hanlon"), Joel Scrafford ("Scrafford"), Richard C. Branzell ("Branzell"), and Robert Prieksat ("Prieksat") (collectively the "Government Agents"). The Bergers have filed a separate Brief in Opposition to the Government Agents' Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First and Fourth Amendments to the United States Constitution, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Const. amend. I.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

The Media seek to wield the First Amendment as a sword to violate the privacy of the people and as a shield to exempt themselves from liability for the unlawful methods they employ. The Ninth Circuit viewed both the written contract between the Media and Government Agents, and their actual conduct, in determining that the Media engaged in "state action" in violating the Bergers' constitutional right to privacy.

The search of the Berger Ranch in March 1993 was not an urban "ride along" to passively "observe" law enforcement doing public service as the Media characterizes their conduct in this case. CNN Petition ("CNN/P") [at page] 2-3, 24. The setting was an isolated private ranch several hours away from the city. The Media were not "properly exercising their professional functions" when they trespassed on the Berger Ranch. CNN/P 9. The Media were not present as a "watch dog" to protect the public against Government Agents' abuse of authority. CNN/P 25. Instead, the Media exploited the exclusive authority of Government Agents to intrude upon constitutionally protected privacy in executing federal search warrants. The Media's conduct did not simply intersect with

the Government Agents' conduct as the Media asserts. CNN/P 13. Their conduct was intertwined and indistinguishable from that of the Government Agents. This was state action. And the Bergers' rights were violated as a result. The record clearly shows that the Media's characterization of the facts is inaccurate and misleading.

This case raises the question of whether the Media should be excused for unlawful newsgathering practices when the Media and Government Agents enter a contract to confer mutual benefits upon each other for a story. This case is not, as the Media would have this Court believe, an attempt to abridge the freedom of the press, nor to determine when a reasonable search is rendered unreasonable. "A search warrant is simply not a press pass." *Hagler v. Philadelphia Newspapers*, 24 Media L. Rep. (BNA) 2332 (E.D. Pa. 1996). Review is unwarranted because the Ninth Circuit's decision applies settled law to the facts of this particular case and is not in conflict with Fourth and Eighth Circuit determinations that state action did not exist in other circumstances.

A. Factual Background

In early 1993, the Media contacted Special Agent Scrafford of the United States Fish and Wild Life Service and initiated negotiations with AUSA McLean on behalf of the Government to join a law enforcement investigation. ER 1:¶¶34-36, 37/A; ER 5/1; ER 2:¶1; ER 6:¶¶18-20; ER 5/7:36:5-25.[2] Those efforts resulted in the March 11, 1993 written agreement ("Agreement"), executed between AUSA McLean and CNN's Hamann, under which the Media were given "exclusive access" to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings ("outtakes") which the Media intended to and did broadcast repeatedly worldwide on their various television

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[2] Citations are to the excerpts of record ("ER") filed by the Bergers in the CNN Appeal No. 96-35266, to the tab number within the ER and the exhibit number and/or page and/or paragraph number within the tab.

outlets. ER 1/A; ER 2/A; ER 5/1[3]; ER 1:¶¶34-40; ER 3:¶¶1, 18-24, 34-50, 68, 69. The Media, in turn, granted the Government Agents' express desire to publicize their efforts to enforce environmental laws. ER 5/1, 5/2, 5/8:T11:7-8.[4] *A week after the Agreement was executed*, a United States Magistrate Judge issued the search and seizure warrants at issue. The Magistrate Judge was not advised of the Agreement nor of the Media's intended participation. The Magistrate Judge did not authorize the Media presence, cameras and microphones. ER 5/3, 5/4; ER 1:¶¶47-48; ER 3:¶¶25-27. The search warrant only authorized a search by federal agents of "The Paul W. Berger Ranch with appurtenant structures, *excluding the residence*." (Emphasis added). ER 3:¶28; ER 4:¶7.[5]

By pre-arranged plan, the Media were an integral part of the Government Agents' convoy of vehicles when the search of the Berger Ranch commenced before dawn on March 24, 1993. ER 5/8:T6-T7:2. With the Government Agents' assistance, the Media video and audio taped the convoy both by a CNN camera shooting from inside a Government vehicle and

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[3] Under the unsigned March 5, 1993 version of the Agreement, the FWS agreed to allow CNN to accompany its Agents in the execution of the search warrant; under the signed March 11, 1993 Agreement, CNN's permission was conferred by the United States Attorney's Office for the District of Montana instead of the FWS.

[4] Mr. Berger was under criminal investigation by AUSA McLean for allegedly killing federally-protected eagles as a result of lacing dead livestock carcasses with poison as a means of controlling predatory coyotes. ER 1:¶74; ER 3:¶32; ER 5/8:T11:2-4. References to "T[#]:[page]" refers to the [video]tape number and page(s) of the (incomplete) written transcription of the videotapes made during the Berger search entitled "Ring of Death." ER 5/8.

[5] The Media were also permitted by the Government Agents to participate in and videotape and record the pre-search briefing conducted on or about March 23, 1994. ER 1:¶¶49-52; ER 3:¶¶29-33; ER 5/2, 5/8T1:3-4, T3:1-5, T:1-6. The Media were made privy to *confidential* information about the Bergers and the criminal investigation against Mr. Berger, including details about the *sealed* warrants and their execution.

by a CNN camera mounted on the exterior of a Government vehicle driven by Government Agents. ER 3:¶34; ER 5/8:T6:2-T7:2. Agents Scrafford also wore a concealed CNN microphone.

Media cameras were focused on Mr. Berger as he came upon the convoy while driving his pick-up truck down the county road at approximately 6:00 a.m. He stopped and was approached by Government Agents including Agents Scrafford, Branzell and Prieksat. ER 4:¶¶2-35/8:T7:2. Agent Scrafford told Mr. Berger a search warrant was about to be executed at his Ranch and that *the Court had ordered a search of every building; Agent Scrafford did not state that the residence was excluded*. ER 3:¶36; ER 4:¶¶4, 7; ER 5/8:T7:6. Agent Scrafford requested to ride in Mr. Berger's truck back to the Ranch, claiming that he wanted to explain the situation to Mrs. Berger.[6] Mr. Berger drove him as requested. ER 4:¶5; ER 5/8:T7:1-16. Agent Scrafford informed Mr. Berger that he would be imprisoned in Billings if he did not cooperate with the federal authorities. ER 8/8T:3. Mr. Berger was shaking and very upset. ER 4:¶17; ER 5/8:102:13-15.[7]

Mr. Berger was never informed that Agent Scrafford was the Media's human "boom mike." Agent Scrafford wore a hidden microphone installed by the Media to record secretly everything said solely for the Media's benefit. ER 3:¶37; ER 4:¶5-6. Mr. Berger was not advised that the Media were videotaping and recording him, including his interrogation by Agents Scrafford, Branzell and Prieksat, who asked him leading questions about his alleged use of illegal poisons and eagle killing. ER 3:¶¶37, 38, 41-42; ER 4:¶¶5, 8-13; ER

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[6] Mrs. Berger was never a suspect or target of the underlying criminal investigation and was never charged with any criminal offense. No formal charges had yet been brought against Mr. Berger at the time of the search. ER 5:¶8; ER 5/3, 5/4.

[7] At the time, Mr. Berger was 71 years old, in poor health and on oxygen and medication, having been in and out of the hospital during the previous five months and just released ten days earlier for treatment of pneumonia and high blood pressure. ER 4:¶17.

5/8:T7:1-16. Mr. Berger was not even informed that the Government Agents had brought the media onto his property. ER 3:¶¶39, 40; ER 4:¶¶9, 14; ER 5/8:T7:1-16. Mr. Berger was never advised of any of his rights, including the right to remain silent. ER 3:¶¶39, 40; ER 4:¶¶9, 14; ER 5/8:T7:1-16.

Although the Berger residence was excluded from the search warrant, Agents Scrafford and Branzell entered the Bergers' home and brought the Media microphone inside.[8] Unbeknownst to the Bergers, their conversations were secretly and, admittedly, monitored and recorded by the Media through Agent Scrafford's hidden microphone. CNN/P 6; ER 3:¶48; ER 4:¶¶5, 6, 8, 10-13, 18; ER 5/8:T7:15-16.[9]

The Government Agents and Media worked jointly to conceal the Media's identity, presence and activities on the Ranch. ER 5/8:T8:13.[10] The Bergers were never advised that the Media had entered the Ranch with the aid of the Government Agents and were conducting a private search by videotaping and recording the search on the Bergers' land and in the various buildings. ER 4:¶¶5, 6, 8, 10-13, 18; ER 5/8:T8:13. The Bergers believed that the Media were Government Agents as they dressed in "street" clothes like the Government Agents and were thus indistinguishable from the law enforcement personnel. ER 4:¶¶11-12; ER 5/8:T6:3. Even after Mr. Berger discovered the videocamera and protested, Hamann deftly directed the camera elsewhere and Agents

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[8] The Bergers contend that Agent Scrafford neither requested nor received permission from them to enter their residence. ER 3:¶¶45-46; ER 4:¶¶5-6; 5/7:115:7-116:4. The entry was well after Mr. Berger had been informed that every structure on his ranch was covered by the search warrant and that he would be imprisoned if he did not cooperate.

[9] Mrs. Berger was in the house. At the time, she was 81 years old and also recently hospitalized in ill health. ER 4:¶17.

[10] Hamann is depicted on the videotape of the pre-search briefing soliciting and discussing with the Government Agents alternative ways to avoid detection of the Media by the Bergers. These scenes were omitted from the written transcript provided by the Media. ER 5/8. The Bergers offered the videotapes to the District Court by way of judicial notice under Fed. R. Evid. 201.

Branzell and Scrafford helped to divert Mr. Berger's attention by bombarding him with leading questions. ER 4:¶¶5, 10; ER 8/8:T8:13.

Government Agents helped the Media set-up and obtain shots and provoked useful "sound bites" from Mr. Berger throughout the day-long search. ER 5/5, 5/2, 5/8:T11:2-8.[11] Many intrusive outtakes of Mr. Berger's images and statements, interiors of ranch buildings, outdoor locations and scenes of the Government Agents' search and seizure of "evidence" were incorporated into a Media program entitled "Ring of Death." ER 5/2, 5/8:T(entire). Although Mr. Berger was acquitted by a jury of three felony counts of killing at least one eagle and convicted only of using a pesticide contrary to its labelling, a misdemeanor, Hamann introduced the segment by implying that Mr. Berger had killed hundreds of eagles.

Government Agents also helped the Media produce and promote the program. AUSA McLean breached his duties when he met with the Media numerous times during his confidential investigation and made confidential disclosures on-camera with Hamann in an effort to do his "bit" for the environment. ER 1:¶¶35-44, 51-54, 74, 75; ER 5/8:T11:7-8. In addition, a few days before Mr. Berger's sentencing on the misdemeanor count, Agent Hanlon sent a letter on official Government stationery to "[a]ll participants in the Paul Berger (INV.4506A0) eagle poisoning investigations" announcing the broadcast schedule for the "Ring of Death" on Turner and CNN programs, "Earth Matters" and "Network Earth":

> the Paul Bergers and non-believers of the world will have a chance to see and hear the truth through the CNN video, not just in Sand Springs, Montana, but the whole WORLD. . . . Japan, Chile, France, and every place in between.

ER 5/10. CNN and Turner channels broadcast the segment nationally and internationally at least ten (10) times through

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[11] The outtakes included on-camera interviews of Government Agents made at the Berger Ranch. During one lengthy interview, AUSA McLean made disparaging personal remarks about Mr. Berger.

April 1994. ER 5/8T12:1-3; 5/9:4. It may still be being broadcast somewhere in the world today.

B. Basis for Federal Jurisdiction Below

The Bergers filed two related civil actions against the Media and Government Agents in the United States District Court in Montana for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal wiretap act (18 U.S.C. §§ 2510, *et seq.*), state common law (trespass, conversion and intentional infliction of emotional distress), declaratory and injunctive relief and monetary damages.[12] On February 26, 1996, the District Court dismissed all counts. District Court jurisdiction was pursuant to 28 U.S.C. §§ 1331 and 1367(a).

The Bergers' Notice of Appeal was timely filed on March 5, 1996, conferring jurisdiction on the Court of Appeals under 28 U.S.C. § 1291. As to the question presented here and for the reasons discussed below, the Ninth Circuit held that the Bergers' rights were violated by the Media-Government foray onto their private Ranch. In sum, the Ninth Circuit reversed the District Court and held that the Media's conduct with the Government Agents was "state action" for purposes of constitutional liability under this Court's "joint action" test. App. 19a. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983). The Ninth Circuit decision was based on a factual determination that the Media and Government Agents formed a conspiracy and engaged "jointly in an enterprise that only the government could lawfully institute – the execution of a search warrant – for the mutual benefit of both the private interests of the media and the government officials' interest in publicity." App. 18a-19a.

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[12] The Bergers initially sued CNN and Hamann on March 24, 1994, filed the First Amended Complaint in March 1995 and the Second Amended Complaint ("Complaint") on May 19, 1995. The Complaint against the Government Agents (which also named Media defendants Turner, Rainey and Hooper) was filed on March 21, 1995 and amended on May 16, 1995.

The Ninth Circuit also declared that the Media were not mere "passive observers" as they prefer to characterize themselves. The Court of Appeals observed that the press in the older, lower court decisions relied on by the Media were different from the "active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." App. 13a. "In none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the Media that occurred in this case." App. 12a. *See Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), *aff'g*, *Ayeni v. CBS Inc.*, 848 F.Supp. 362 (E.D.N.Y. 1994).

Coupled with finding that the Media were state actors, the Ninth Circuit ruled that the Bergers' Fourth Amendment rights were violated, leaving the Media open for liability because,

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose . . . . This search violated [the Fourth Amendment's] protections.

App. 9a-10a.[13]

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[13] In holding that the "invited informer" doctrine did not apply, the Ninth Circuit ruled that the Media's use of the hidden microphone was unlawful eavesdropping and violated the Bergers' privacy "because the surreptitious recording was not done for a legitimate law enforcement purpose." App. 15a.

The Ninth Circuit also ruled that the Government Agents were not protected by qualified immunity from liability because they permitted the Media to join the search party, observing that,

> no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.

App. 11a-12a. *See Ayeni v. Mottola*, 35 F.3d at 682-84.

REASONS WHY THE MEDIA'S WRIT SHOULD NOT BE GRANTED

Review of "state action" is unwarranted because the Ninth Circuit's decision applies settled law in a fact-specific determination of a particular case and is not in conflict with the decisions of this Court or the courts of appeals. The Media rely on cases in which "state action" was not found based on a total lack of evidence of state action or one single act, but they cannot refute the aggregate of facts here. While there are several fact-based tests to determine "state action", the Media's selected tests do not apply to the facts presented. CNN/P 12-13 (citing, for example, *see Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (government coercion); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 411-12 (1995) (O'Connor, J., dissenting) (state influence or coercion); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 196 (1988) (mere approval of or acquiescence)). The real issue here is that the Media disagree with the result rendered by the Ninth Circuit, not the law.

Review is clearly unwarranted on the Petition of the Media on the issue of whether law enforcement violates the Fourth Amendment when it permits the media to join a search. That issue does not concern the Media. The courts affirmed that in *March 1992* – one year *before* the Berger search in March 1993 – that the law was already "clearly established" that federal agents violated the Fourth Amendment when they brought onto private property "persons who

were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there." *Ayeni v. Mottola*, 35 F.3d. at 685 (Secret Service brought CBS camera crew); *see Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (police allowed company employee to search for stolen company goods). The real issue is whether the Media violated the Bergers' Fourth Amendment rights when the Media planned, joined and participated in the Government Agents' search of the Berger Ranch under the cloak of, but without any authority under the search warrant.

I. THE NINTH CIRCUIT'S HOLDING THAT THE MEDIA WERE STATE ACTORS WHEN THEY JOINTLY AND ACTIVELY PARTICIPATED WITH GOVERNMENT AGENTS UNDER A CONTRACT TO CONFER MUTUAL BENEFITS IS CONSISTENT WITH EXISTING LEGAL PRECEDENT

The Media assert that the Ninth Circuit ignored the law applicable to determining "state action."[14] Their argument is that entering private property for reasons independent of the Government Agents' motive to execute a search warrant absolves them of any responsibility even if the Government Agents are liable. CNN/P 8-16. The Ninth Circuit opinion shows why the Media are wrong, as it applied the law that makes private parties liable for their actions, not motives, when conducted jointly with Government Agents.[15]

This Court, the Ninth Circuit and other courts of appeal have long recognized that liability under *Bivens* for violating

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[14] References to "state action" encompass actions "under color" of federal law. *See Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

[15] The Media rely on "state action" tests which are inapposite as they do not apply to the facts and circumstances. CNN/P 12-13 (citing, for example, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) and *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 411-12 (government coercion)). These cases were mentioned by the Ninth Circuit only to illustrate the four tests.

Fourth Amendment rights extends to private parties who (1) engage in "state action" "under color" of federal law, and (2) deprive plaintiffs of rights secured by the Constitution or federal statutes. *See Bivens*, 403 U.S. at 392-98; *Ginn v. Mathews*, 533 F.2d 477, 478-488 n.4 (9th Cir. 1976) (the law of the Ninth Circuit is that status as a private corporation cannot defeat *Bivens* liability where the defendant has engaged in "state" action under color of law); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989); *Reuber v. United States*, 750 F.2d 1039, 1057 (D.C. Cir. 1984).

There is "no specific formula for defining state action." *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983) (citing *Melara v. Kennedy*, 541 F.2d 802, 805 (9th Cir. 1976)). The "existence of governmental action is a question of fact." *See Howerton*, 708 F.2d at 383; *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State with private conduct be attributed its true significance."); *accord*, *Life Ins. Co. v. Reichardt*, 591 F.2d 499, 501 (9th Cir. 1979). Here, the Ninth Circuit's decision was properly based on an analysis of an abundance of facts under the "joint action" test.

A. THE MEDIA'S PRIVATE MOTIVE DOES NOT EXEMPT THEIR JOINT ACTIONS WITH THE GOVERNMENT AGENTS FROM BEING STATE ACTION

The Media assert that because their motive for joining the Berger search was independent of the Government Agents' motive, their conduct is not actionable on constitutional grounds. CNN/P 10-16. Courts have long recognized, however, that private motive alone does not preclude finding that a private party engaged in "state action." *See United States v. Cleaveland*, 38 F.3d 1092, 1094 (9th Cir. 1994) (the mere existence of a legitimate, private motive does not immunize a search from scrutiny where the government's participation with a private party can be "so extensive as to trigger

Fourth Amendment scrutiny").[16] The key to determining this issue is to examine the facts evidencing the relationship between the Government Agents and private party. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936-943 (1982) (necessity of private creditor to execute writ of attachment required no more than invoking "joint participation" of sheriff);[17] *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (private co-conspirators were "willful participant" state actors under 42 U.S.C. § 1983 for bribing a judge to enter an injunction).

While the Media's motive alone was not relevant to the Ninth Circuit's analysis, the Media's conduct was dispositive.[18] Applying the "joint action" test, the Ninth Circuit found the test satisfied and this "Court has said [the test] is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a Government actor and a private party [citation omitted]." App. 18a. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970) (state action is established under the "joint action" test upon showing that the private party was "a *willful* participant in joint action with the State

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[16] The power company in *Cleaveland* did not engage in "state action" when an employee went to read a meter at the home of a suspected power thief and asked a police officer to watch him from the street to ensure his safety. *Id.*

[17] The dissent in *Lugar* challenged this Court's decision based on the "joint participation" theory arguing that there can be no state action where the state is not responsible for the private decision to behave in a certain way, or where the initiative to act comes from the private party and not the state. *Id.* at 949-50. That is not what occurred here. Although the Media initiated first contact, the Government Agents were responsible for permitting the Media to join and took the initiative to arrange access to the Berger property as part of the search party.

[18] The Ninth Circuit properly ruled that the district court was wrong when it concluded that the Media did not act "under color" of law because their cameras were at the Berger Ranch as a means of furthering their own interests. App. 17a-21a.

or its agents [citation omitted].");[19] *see Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983); *Ginn v. Mathews*, 533 F.2d 477 (9th Cir. 1976). The Court of Appeals noted that,

> [i]n this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute – the execution of a search warrant – for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation. This satisfies the joint action test.

App. 19a.

The Media's reliance on *Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997), does not support their purported private motive excuse. The majority of the Eighth Circuit panel in *Parker v. Boyer* did not conduct any state action analysis. It appears to have relied on the underlying district court opinion, *Parker v. Clarke*, 905 F.Supp. 638 (E.D. Mo. 1995), *aff'd in part and rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997), in which the district court failed to find that the media engaged in state action because there was no allegation that the media acted in accordance with any state rule of conduct and because the court found no evidence of

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[19] Proof of joint action establishes both state action and action under color of law. *Howerton*, 783 F.2d at 383 n.6 (citing *Adickes*, 398 U.S. at 152).

"any affirmative agreement" between the media and police. *Id.* at 642. In contrast, the Bergers alleged in their complaint that the Media acted under the cloak of the Government Agents' official warrant authority and the evidence is undisputed that the Media executed the written Agreement with the Government Agents. Consequently, it was not private motive alone that absolved the media in *Parker v. Boyer* from engaging in state action, it was the insufficiency of evidence and pleading.[20]

Other cases cited by the Media are factually inapposite. State action was not found in those cases because there was insufficient evidence to show a legally cognizable relationship between the private party and the Government Agents. For example, there was no evidence of any "exceptional circumstances" in *Jones v. Taibbi*, 508 F.Supp. 1069 (D. Mass. 1981), sufficient to find that the defendant reporter engaged in state action because his agreement with the police was only to refrain from broadcasting a story about a murder suspect so that he could later cover the arrest. *Id.* at 1073. The defendant there was not, as here, a "willful participant" in any planning or pre-search briefing, he did not hide a microphone and videocamera, and he did not participate in any search. Similarly, the defendant wife of the sheriff in a town of 300 in *Price v. Baker*, 693 F.2d 952 (10th Cir. 1982), was not a state actor when, while sitting in her husband's squad car only as a companion, she hit the plaintiff who climbed into the back seat while fighting with another bar brawler as the sheriff was

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[20] Had the Eighth Circuit in *Parker v. Boyer* conducted the appropriate analysis it would have found, as the dissent pointed out, that the defendant news crew "acted in concert with the police" as "willful participant[s]" insofar as they contacted the police and solicited an invitation to join the police, were invited by a police sergeant and "came to the location with the police [in the police car] and could not have entered if the police had not done so first." *Id.* at 449. The police chief even testified that the media's conduct was unlawful where allowing the press to join a police search would constitute a trespass. *Id.* at 447. Even if there was a full inquiry, the *Parker v. Boyer* case is factually dissimilar based on the amount of evidence presented here.

occupied outside, because the sheriff did not direct her to act and she was not a willful participant in a joint activity with her husband. *Id.* at 953-54.[21]

Indeed, the proposition cited by the Media in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), that state action occurs with "governmental compulsion or significant encouragement" (CNN/P 13), is precisely what took place here. *Id.* at 547-48. By government compulsion as against the Bergers, the Media entered the Bergers' private property and by significant encouragement from the Government Agents, the Media conducted their own private search by video and audio recording.[22] *See United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir. 1989) (citing *Fonda v. Gray*, 707 F.2d 435, 437 (9th Cir. 1983)) (evidence that employer cooperated with police and actively encouraged them to arrest strikers defeated summary judgment in civil rights action); *see Howerton*, 708 F.2d at 384 (private landlords were state actors and violated § 1983 when they asked police to accompany them at every step of eviction proceeding and officer went to the property on his own); *see also Anderson v. WROC-TV*, 441 N.Y.2d 220, 226 (1981) (stating in a case in which the media was sued for trespass, that "[i]f the media were to succeed in compelling an uninvited and

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[21] The record in *Russ v. Ratliff*, 538 F.2d 799, 805 (8th Cir. 1976), was simply "barren of showing any unlawful or negligent conduct on Draper's part in the events leading up to the death of Russ." The plaintiff in *Freedman v. Coppola*, 614 N.Y.S.2d 833 (N.Y. App. Div. 1994), failed to demonstrate the existence of a triable question of fact on the issue of conspiracy.

[22] Otherwise, the case is irrelevant where the USOC obtained an injunction to preclude use of the word "Olympic" by another private entity but did not engage in conduct with any Government Agents. Reliance on *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988) is also inapposite. There, the state university's state actor status was not imputed to the NCAA because they were antagonists, not joint participants, in investigating the coach, and the rules the NCAA sought to impose were not state law but created by its collective membership. *Id.* at 196 n.16.

nonpermitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists").

The Ninth Circuit correctly analyzed the facts and the law in holding that under the "joint action" test the Media were engaged in state action. There is no conflict among the courts of appeals that "state action" exists here.

B. THE MEDIA'S CONTRACT AND JOINT ACTIVITIES WITH THE GOVERNMENT AGENTS CONSTITUTE STATE ACTION BY CONSPIRACY

The Media condemn the Ninth Circuit's decision under the "joint action" test as "far too sweeping" because their "letter agreement" with the Government Agents and "attendance" at the pre-search briefing where Government Agents "shared" confidential information are insufficient to show evidence of a "corrupt conspiracy." CNN/P 16-21. While the Media rely on cases where these elements individually were insufficient to find "state action," those cases are inapposite where, as here, the evidence in the aggregate shows conduct supporting shared, common unconstitutional goals. The Ninth Circuit correctly understood this distinction in rendering its decision on the "state action" issue.

This Court and the Ninth Circuit have long recognized that a conspiracy is proof of "state action." *see Howerton*, 708 F.2d at 383 (citing *Adickes*, 398 U.S. at 153) (where a private party and government official "somehow reached an understanding to deny" a constitutional right, "such a conspiracy plainly provides the state action essential to show a direct violation . . . of rights, whether or not the actions of the police were officially authorized, or lawful [citations omitted]."). "It is enough that [the private party] is a willful participant in joint activity with the State or its agents." *Adickes*, 398 U.S. at 153 (citing *United States v. Price*, 383 U.S. 787, 794 (1966)); *see Callanan v. United States*, 364 U.S. 587 (1961); *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1343 (9th Cir. 1990) (civil conspiracy is a combination of two or

more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means).

1. The Contract Memorialized the Conspiracy

In rendering its decision in this case, the Ninth Circuit was not required to find that the conspiracy was "corrupt," but only that it existed. App. 18a-19a. The common unconstitutional goal was to violate the Bergers' Fourth Amendment rights to privacy and protection against unreasonable search and seizure.

The Ninth Circuit correctly considered the evidence in the aggregate showing the requisite "meeting of the minds" and "willful participation" which included: (1) the Media's knowledge that the Berger Ranch was private property (ER 5/2); (2) the Media's request to enter the Berger Ranch under federal search warrant authority; (3) the Agreement; (4) that the Government Agents knew or should have known that clearly established constitutional law prohibited private parties during searches unless necessary and authorized by the search warrant (Agent Scrafford's remarkable testimony that he advised the Media they could not legally enter the Berger Ranch under the warrant (ER 5/7:37:2-13)); (5) the Agreement was copied to the Media's in-house counsel (ER 5/7); (6) the Media agreed not to broadcast outtakes of the search until after Mr. Berger's criminal trial, implying they knew his constitutional rights were jeopardized by their conduct (ER 1/1; 5/1); (7) the Media participated in the pre-search briefing and obtained confidential information; (8) Agent Scrafford wore a hidden Media microphone; (9) the Media's camera was mounted on a Government vehicle; (10) the Media trespassed onto the Berger Ranch and with the Government Agents' help, videotaped and recorded the Bergers' private images (in the house, outside on the property and in outbuildings), and converted these outtakes for commercial use; (11) the Media provided publicity for AUSA McLean and the Government Agents by repeated broadcasts; (12) the Media and Government Agents worked together to deflect detection of the

Media by the Bergers including Hamann's diversion of the camera after discovery by Mr. Berger while Government Agents diverted Mr. Bergers' attention; and (13) AUSA McLean's on-camera interview; and (14) Fish and Wildlife's use of official stationery to announce and endorse the CNN broadcast. The Media were not passive observers. (ER 1:¶¶34-78, 82, 83; ER 2:¶¶1, 2/A, 8; ER 5/2).

2. The Joint Activities Were Mutually Beneficial

The cases cited by the Media to rebut the Ninth Circuit's finding that the existence of the contract was dispositive of the conspiracy only serve to underscore that in this case the Media engaged in state action because of their deep relationship with the Government Agents. In cases cited by the Media, there was no "state action" because there was simply no evidence that the private defendant shared a common, unconstitutional goal with the state. CNN/P 19. *See Cunningham v. Southlake Center for Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir. 1991) (no evidence of knowledge by county jail employees of private contractor's alleged reason for firing employee from jail counseling job); *Collyer v. Darling*, 98 F.3d 211 (6th Cir. 1996) (no evidence of shared unconstitutional goal between private psychiatrist and state clinic under one-time contract to examine plaintiff-former employee's mental state); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1450 (10th Cir. 1995) (no evidence that state university influenced policy or execution of pat-down searches by private security company under contract at private concert held in 1991 at the university center); *Simescu v. Emmet County Dept. of Social Services*, 942 F.2d 372, 375 (6th Cir. 1991) (no evidence of state coercion or encouragement to private daycare center to hire welfare recipients where contract with state gave daycare center right to select or reject workers).

3. The Information Was Not Publicly Available

The Media assert that to hold them as "joint actors" because they obtained "confidential information from the

Government" is "antithetical to the historic and constitutionally protected role of the news media." CNN/P 10-21. This Court has long recognized, however, that the Media have no "constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). Here, the Media not only obtained non-public information *from* the Government Agents, they also seized information, sound recordings and photographic images *with* the cooperation and assistance of the Government Agents on private property. It is the Media's conduct that is antithetical to the historic and constitutionally protected rights of individuals. Under these circumstances, the First Amendment cannot be exploited as a defensive tactic. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("[t]he extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights reasonably – a duty widely acknowledged but not always observed by editors and publishers").[23]

The Media obtained confidential information from the Government Agents and from the Bergers under a sealed search warrant during a confidential criminal investigation. In return, the Media publicized the Government Agents' law enforcement efforts. Joint efforts conferred mutual benefits. This was unlawful conduct. *See Times Mirror Co. v. United States*, 873 F.2d 1210, 1215-1216 (9th Cir. 1989) (denying press access to search warrant materials because disclosure would jeopardize the criminal investigation and pose a grave risk to the targeted individual's privacy); *see also United States v. Capra*, 501 F.2d 267, 279 (2d Cir. 1974) (admonishing law enforcement to forbid press from pre-arrest briefings).[24] The facts of this case simply show that the Media's

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[23] While this Court refused to prioritize First and Sixth Amendment rights in *Nebraska*, the Fourth Amendment should be protected here over economic interests hiding behind the First Amendment. *Id.* at 562.

[24] Government Agents' disclosure was also prohibited by the Department of Justice ("DOJ") and the Privacy Act, and punishable by

reliance on cases involving information available to the public is unavailing.[25] Other cases relied on by the Media are equally inapposite as there was no evidence found to support "state action."[26] CNN/P 20. In light of the foregoing, the Agreement coupled with the totality of the facts, clearly establish a conspiracy and state action. *See Callanan*, 364 U.S. at 587; *Vieux*, 908 F.2d at 1343; *see also United States v. Shabani*, 513 U.S. 10, 12 (1994) (overt act not required for common law conspiracy); *cf. State v. Houchin*, 765 P.2d 178,

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criminal sanctions. *See* 5 U.S.C. § 552a (disclosure under the Privacy Act required the Bergers' written consent or court order). The DOJ specifically *prohibits the release of information to the media by DOJ personnel*, during an investigation, particularly "subjective observations" about the character of persons under investigation, or reference to investigative procedures, witnesses or evidence, or any opinion as to the person's guilt, where release "tends to create dangers of prejudice without serving any law enforcement function." *The prohibition is absolute* where disclosure "could reasonably be expected to be disseminated by means of public communication. . . . " 28 C.F.R. § 50.2(b)(1)-(6); *see Department of Justice Manual* ("DOJ Manual"), 1-7.001 at 1-285 (1990-1 Supp.); 1-7.000 (1993 Supp.) ("favoritism should be shown to no member of the media").

[25] Cases cited by the Media are inapposite because they did not arise on private property and the information obtained from the Government Agents was neither sealed nor confidential. *See Brooks v. American Broadcasting Cos.*, 737 F.Supp. 431, 435, 437-40, (N.D. Oh. 1990) (no "state action" where government not involved and media interview of plaintiff was on public street based on public indictment); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989) (case remanded for lack of evidence on "state action" issue).

[26] *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984) (no evidence of "state action" shown by plaintiff who also failed to refute affidavit on summary judgment that press acted professionally and not in conspiracy); *Pino v. Higgs*, 75 F.3d 1461, 1465 (10th Cir. 1996) (no evidence that private therapist exercised "some right or privilege" or acted under a "rule of conduct" created by the state); *Lowe v. Aldridge*, 958 F.2d 1565, 1573 (11th Cir. 1992) (no evidence and no allegation that private therapist involved in procuring search warrant upon which constitutional violation was claimed).

179 (Mont. 1988) (Montana Code Annotated § 45-4-102, requires showing of overt act).

C. THE MEDIA CANNOT WIELD THE FIRST AMENDMENT AS A SWORD TO EXPLOIT THE GOVERNMENT AGENTS AND PRIVATE PERSONS

The Media argue that because they are "institutionally autonomous" from the Government, the Government Agents are obligated constitutionally to respect their independence and, therefore, they cannot be "state actors". CNN/P 21. In other words, the Media believe that they are above reproach for employing unlawful methods to obtain information and that any wrongdoing is the fault of the Government Agents. Apparently, the Media conclude that they, unlike anyone else, cannot commit a crime. This conclusion defies logic. The Media also assert that to hold a broadcaster a "state actor" would be inimical to the First Amendment. CNN/P 21. In fact, *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 140 (1973), made clear that an analysis of the facts is required when, "[i]n dealing with the broadcast media, as in other contexts, the line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority." *Id.* at 116.[27]

The Media simply ignore the facts because to address the facts in the aggregate would be an admission of "state action." Thus, to justify their presence on the Berger Ranch, the Media invoke as their mantra, this Court's recognition in *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971), that the intent of the First Amendment is to protect the press to "bare the secrets of the government and inform the people." CNN/P 19. What the Media ignore is that in the

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[27] In that case, a broadcast licensee's refusal to accept a paid editorial advertisement was not "state action" because the Federal Communications Commission was not involved in the licensee's policy on the issue. *Id.* at 119.

same paragraph, this Court reminded them that the intent of that First Amendment protection is only to allow the press "to serve the governed, not the governors." *Id.*[28]

Here, the Media's conduct was contrary to the intent of the First Amendment where they served the Government Agent "governors" to bare the secrets of the Bergers, the "governed", for the mutual benefit of the Government and the Media in violation of the Bergers' Fourth Amendment rights. ER 5/1, 5/2, 5/8:T11:7-8. By remanding the Bergers' state law claims for trespass and infliction of emotional distress, the Ninth Circuit recognized that the press in general, and the Media in particular, cannot break the law in newsgathering. App. 22a-25a. Op.516-17.

The First Amendment has never been held to preempt the Fourth Amendment and "is not a license to trespass, steal, or to intrude by electronic means into the precincts of another's home or office." *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); *see Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973) (crimes and torts committed to gather news are not constitutionally protected because "[t]here is no threat to a free press in requiring its agents to act within the law"). The Media's reliance on early "state action" cases involving the press is inapposite and irrelevant where, for example, the newspapers in *Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), were not "state actors" for simply doing their job in refusing to print the plaintiff union's editorial advertising because they never consented to offer unrestricted access to advertising space and never assumed to provide a public function to every member of the general public. *Id.* at 475.[29] There was no

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[28] Contrary to the Media's purpose for citing *Polk County v. Dodson*, 454 U.S. 312 (1981), their multi-faceted role in society is not analogous to a state employed public defender, whose sole purpose is to act as an independent adversary of the state. *Id.* at 318. Again the Media miss the point that a public defender serves the "governed" not the "governors."

[29] For the same reasons the newspaper was not a "state actor" in *Resident Participation of Denver, Inc. v. Love*, 322 F.Supp. 1100 (D. Colo.

newspaper "state action" in *Mimms v. Philadelphia Newspapers, Inc.*, 352 F.Supp. 862 (E.D. Pa. 1972), because the court erroneously did not recognize a federal right to privacy. Superseding decisions by this Court recognize a federal privacy right under the Fourth Amendment. *See Winston v. Lee*, 470 U.S. 753, 758-762 (1985); *see also Soldal v. Cook County*, 506 U.S. 56 (1992).

D. THE MEDIA CANNOT WIELD THE FIRST AMENDMENT AS A SHIELD FROM LIABILITY FOR UNLAWFUL CONDUCT

The Media argue that the Ninth Circuit's decision holding them "state actors" jeopardizes their First Amendment right to serve as "watch dog" of the Government and to report on matters of public concern. CCN/P 23-25. The only examples the Media mention where they may be engaged with Government Agents in joint planning and participation for newsgathering purposes, however, involve *public* situations (*e.g.*, access to crime scenes, government buildings and press conferences). CNN/P 24. The Ninth Circuit decision does not create a conflict among the courts of appeals; it reaffirms legal precedent that the Media cannot engage in unlawful activities when gathering information.

This Court has long recognized that the First Amendment does not grant the press immunity from the application of "general laws." *Branzburg*, 408 U.S. at 683; *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its

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1971). Plaintiffs did not allege that any newspaper was a "lackey of the city or state administration or in any other way in the grip of official power"; the First Amendment does not prohibit newspapers from refusing advertisements. *Id.* at 1105. Student editors of a high school newspaper and annual were not "state actors" in *Yeo v. Town of Lexington*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2060 (1998) (en banc); they had a policy of refusing to publish political or advocacy advertising and their decision was independent of school officials. *Id.* at 242-43, 253-55.

ability to gather and report the news"). Further, the Ninth Circuit focuses on the method of newsgathering and has held that the First Amendment does not protect the news media from "calculated misdeeds." *Dietemann*, 449 F.2d at 249-50 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9, 389-90 (1967)).[30] According to the Ninth Circuit in *Dietemann*,

> The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

Id. at 249.

The Second Circuit, as well, has held that "[t]here is no scope to the First Amendment right. Crimes and torts committed in newsgathering are not protected." *Galella*, 487 F.2d at 995;[31] *Ayeni v. CBS Inc.*, 848 F.Supp. at 368 (media's motion to dismiss trespass claim denied because qualified immunity inapplicable to private parties engaged in "state action" and where Secret Service agent exceeded scope of search warrant in violation of Fourth Amendment); *see also Prahl v. Brosamle*, 295 N.W.2d 768, 780-81 (1980) (no First Amendment privilege to trespass); *Le Mistral, Inc. v. CBS Inc.*, 402 N.Y.S.2d 815, 817 (1978) (no First Amendment balancing required to find that media camera crew committed trespass in restaurant); *Miller v. National Broadcasting Co.*, 187

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[30] In *Dietemann*, two *Life* magazine employees, acting in concert with law enforcement, used false identities to gain access into plaintiff's home/office where they surreptitiously videotaped and recorded "evidence" that plaintiff was a "quack." *Id.* at 249-50. The Ninth Circuit noted that the First Amendment protections covering publication are "not relevant in determining liability for intrusive conduct antedating publication." *Id.*

[31] The court of appeal affirmed a restraining order and refused to extend a First Amendment privilege to a photographer who "intrusively" and in a "harassing manner" attempted to photograph Mrs. Onassis and her family. *Id.* at 993.

Cal.App.3d 1463, 1482-88 (1986) (camera crew invaded privacy by entering home with paramedics to film plaintiff's dying husband without her consent).[32]

United States District Judge Jack Weinstein put the issue here in perspective in noting that,

> While the First Amendment provides the press with a shield from censorship, the press may not use this protection to justify otherwise illegal actions.

United States v. Sanusi, 813 F.Supp. 149, 155 (E.D.N.Y. 1992) (criminal case underlying the *Ayeni* opinions).[33]

II. THE NINTH CIRCUIT'S HOLDING THAT THE MEDIA VIOLATED THE FOURTH AMENDMENT BY JOINING THE GOVERNMENT AGENTS FOR PRIVATE PURPOSES IS CONSISTENT WITH LEGAL PRECEDENT

It is well settled that the Fourth Amendment limits law enforcement authority to invade a person's privacy to execute a search warrant. *Katz v. United States*, 389 U.S. 347, 356-57 (1967). It is equally well settled that an officer executing a warrant is limited to actions expressly authorized by the warrant. *See Bivens*, 403 U.S. at 394 n.7; *See also Michigan v.*

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[32] Other cases where the press was excused do not apply to the facts here. *Cf. Baugh v. CBS Inc.*, 828 F.Supp. 745, 750 (N.D. Cal. 1993) (plaintiff's consent to entry by media with crisis intervention team vitiated claim for trespass and intrusion under California law); *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976) (news photographer asked by fire fighters to assist investigation by photographing gruesome scene in plaintiff's house excused by Florida custom and usage doctrine to use media in emergencies), *cert. denied*, 431 U.S. 930 (1977).

[33] Even cases cited by the Media recognize that, at a minimum, they committed *trespass*. *See Parker v. Boyer*, 93 F.3d at 447 (police chief testified that allowing press to join search in violation of policy would be trespass); *Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992) (General Motors' security guard trespassed to take photographs independent of search party).

Summers, 452 U.S. 692, 705 (1981) (actions implicitly authorized by a warrant are limited to those reasonable to advance a legitimate law enforcement purpose relating to the warrant or the officer's safety); *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997) (actions reasonably necessary to effectuate the warrant's purpose). Federal statutes also limit the presence of private parties during searches unless specifically authorized under the warrant to serve law enforcement purposes. *See* 18 U.S.C. § 3105.[34] *See Ayeni v. Mottola*, 35 F.3d at 680; *United States v. Clouston*, 623 F.2d 485, 486 (6th Cir. 1980) (telephone company employees asked to identify equipment during search); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982) (state drug enforcement officer asked to assist in execution of federal drug search warrant).

The search warrant here did not authorize the Government Agents to bring the Media, or to video or audiotape the search and the Bergers for commercial purposes. The Second Circuit in *Ayeni v. Mottola*, 35 F.3d at 685, concluded that,

> The unreasonableness of . . . [this] conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but *it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect – the right to privacy* . . . .

The Media's joint actions with the Government Agents not only violated federal statutes proscribing unauthorized private participation during searches, the Media's conduct violated case law circumscribing government actions under a

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[34] Section 3105 limits who may serve a search warrant and is one of several statutes restricting the execution of warrants. *See* 18 U.S.C. §§ 2234 (criminalizes willfully exceeding authority under a search warrant); 2236 (criminalizes a warrantless search of a private dwelling); and 3109 (limits the circumstances law enforcement can use force to enter a private dwelling); Fed. R. Crim. P. 41 regulates the issuance and execution of search warrants.

warrant.[35] There is no dispute that the Media were not named in the search warrant and were not on the Berger Ranch to *assist* in its execution. ER 5/4, 5/5.[36] Thus, the Ninth Circuit correctly found that the Media's presence, actions and use of the Government Agents did constitute "participation" in the execution of the warrant. The Media did not play "a passive role". App. 13a. The Ninth Circuit correctly distinguished the older, unpublished lower court cases relied on by the Media because in those cases the Court failed to recognize the people's right to privacy under the Fourth Amendment. App. 12a.[37] According to the Media's view, prisoners have

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[35] *Id.*, citing *Michigan v. Summers*, 452 U.S. 692 (1981) (detaining occupants while search in progress if for reasonable law enforcement purpose); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985) (officers cannot flagrantly disregard terms of the warrant); *see also Marron v. United States*, 275 U.S. 192, 195 (1927) (warrant must particularly describe items to be seized to minimize interruption of privacy); *Bills*, 958 F.2d at 704 (law enforcement have "fiduciary" obligation to resident only to take actions reasonably necessary to execute the warrant); *United States v. Becker*, 929 F.2d 442, 446 (9th Cir. 1991) (search may not be unreasonably destructive of property).

[36] The Media's actions including the illegal taking of images and statements, further violated case law which limits seizures under a warrant to the items described in the warrant or items in plain view that are obviously connected to the crime under investigation. *See United States v. Juichang Chen*, 979 F.2d 714, 717-719 (9th Cir. 1992) (where government installed three surveillance cameras and warrant authorized only one, evidence from two of the cameras was suppressed).

[37] *See Higbee v. Times-Advocate, Inc.*, 5 Media L. Rep. (BNA) 2372 (S.D. Ca. 1980) and *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Oh. 1984). These cases were relied on by the district court in *Berger* to find that the Media's presence was not unlawful. App. 12a. *Moncrief*, however, erroneously held that a constitutional wrong required violation of a *non*-4th Amendment privacy right (*e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973)); *Higbee* turned on a restrictive characterization of the privacy right violated by the intrusion of the media under a warrant. Superseding decisions by this Court confirm that a privacy right exists under the *Fourth Amendment* and clearly invalidate these erroneous decisions. *See Winston*, 470 U.S. at 758-762; *see also Soldal*, 506 U.S. at 64.

more privacy rights than plaintiffs. *See Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).[38]

CONCLUSION

When the Media execute a written contract with Government Agents, trespass on private property, use Government Agents to perform and stage video and audio recordings of the search of private property, and install a hidden microphone on a Government Agent to surreptitiously obtain private sound bites inside a private home excluded from the search warrant, the Media are engaged in "state action." For the reasons set forth in this opposition, the Bergers respectfully submit the Media's Petition for Writ of Certiorari should be denied. Alternatively, the Bergers submit that if the Media's Petition is granted, that their Conditional Cross-Petition be granted as well.

Respectfully submitted,

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[38] As this Court observed in *Houchins*, "[i]nmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not animals in a zoo to be filmed and photographed at will by the public or by media reports, however 'educational' the process may be for others." *Id.* at 5 n.2 (plurality opinion).

No. 97-1914

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CABLE NEWS NETWORK, INC.;
TURNER BROADCASTING SYSTEM, INC.;
ROBERT RAINEY; DONALD HOOPER; and JACK HAMANN,
Petitioners,

v.

PAUL W. BERGER; ERMA R. BERGER; UNITED STATES OF AMERICA; RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; and KRIS MCLEAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Contrary to the Bergers' claims, Br. in Opp'n at 2, 3, 11, 22-26, CNN has never argued that the First Amendment is either a "sword" or a "shield," absolving the news media from liability for crimes or torts committed in the course of newsgathering. The Bergers' rhetoric fails to address the first Question Presented in the Petition: whether CNN can be held liable for a *constitutional* violation *as if it were an arm of the government*. The Bergers simply dismiss the second Question Presented—whether a search otherwise authorized by a warrant violates the Fourth Amendment when law enforcement agents allow journalists to observe it—by arguing it "does not concern the Media." *Id.* at 10. In both cases, the Bergers fail to respond meaningfully to the reasons advanced by CNN for granting the Petition.

As to the first Question Presented, both the Bergers and the Ninth Circuit ignore the news media's disassociation from government inherent in our constitutional structure and long recognized by this Court and others. Pet. at 21-23. To accept the Bergers' argument and the opinion below is to accept that—for purposes of *Bivens* liability—the Constitution makes no distinction between the press and the police, or between press coverage of government activity and that activity itself. By arguing the contrary, CNN does *not* assert "the Media . . . cannot commit a crime." Br. in Opp'n at 22. Rather, it asserts simply that constitutional liability differs from statutory or common-law liability, and that the state action doctrine's limitation on "the power [of courts] as directed against . . . private interests" must be heeded—particularly where the private interest in question is constitutionally recognized as separate from the government. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982). The First Amendment is relevant in this regard because it defines and reinforces the news media's independence from government.

Moreover, the Bergers err in claiming the Ninth Circuit opinion does not conflict with this Court's state action jurisprudence. Neither CNN's alleged conduct nor the "aggregate of facts here" amounts to joint action consistent with this Court's precedents. Though the state action inquiry may require "sifting facts and weighing circumstances," *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), this Court has never found state action under facts akin to those present here. The two courts of appeals that have confronted the state action question in the context of media "ride alongs"—the Ninth Circuit here and the Eighth Circuit in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997)—are in conflict. Furthermore, other courts will confront similar cases in the future.[1] This Court's review is necessary because the Ninth Circuit's holding now casts a huge shadow over the news media's ability to effectively cover government law enforcement activities.

As to the second Question Presented, the Bergers' claim that the Fourth Amendment issue is of no concern to CNN is untenable. CNN could not be liable under *Bivens* unless the search violated the Fourth Amendment. More generally, the news media are concerned with the immediate implications for news coverage of a holding that their presence at an otherwise permissible search is unconstitutional. Furthermore, the Brief in Opposition does not even attempt to refute the 2-2 conflict (Pet. 25-28) among the courts of appeals on this issue.

As an initial matter, CNN must address the Bergers' mischaracterization of the facts.

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[1] *See, e.g., Wilson v. Layne*, 141 F.3d 111, 132 (4th Cir. April 8, 1998) (*en banc*) (Murnaghan, J., dissenting) (given "the prevalence of real-life police dramas on television," other courts "soon enough" will confront questions about the constitutionality of "ride alongs"), *petition for cert. filed*, —— U.S.L.W. —— (U.S. July 7, 1998) (No. 98-83).

CORRECTION OF THE BERGERS' MISSTATEMENT OF THE CASE

In an effort to shoehorn the facts into their "joint action" theory, the Bergers attribute significance to, or otherwise mischaracterize, the facts in a manner that cannot be sustained by the record. Most blatantly, the nefarious implications the Bergers attribute to the letter confirming that reporter Hamann had permission to observe the FWS search are plainly refuted by the document itself. The letter, which can be read in full in the Ninth Circuit opinion, App. 4a-5a, on its face is neither a *quid pro quo* arrangement nor a formally executed "contract," as the Bergers repeatedly suggest. *Nowhere* does it say CNN has been granted "exclusive access" to obtain "outtakes," and nowhere does CNN "grant[] the Government Agents' express desire to publicize" their enforcement efforts. Br. in Opp'n at 3-4. It only confirms Hamann's previously obtained permission for a "ride along," and states that CNN agreed to embargo any news footage until showing the footage posed no danger to any defendant's fair trial rights. The letter does not evince participation by CNN in the search or the already ongoing—and completely independent—criminal investigation of Paul Berger. Nor does it distinguish this case from others in which journalists seek and obtain permission to observe police at work.

Similarly, the conduct of the search and behavior of the government officials in no way suggest government participation in CNN's newsgathering, or CNN's support of any government objective. For example, the Bergers complain about Assistant U.S. Attorney McLean taking time, during the several-hour search, to be interviewed on camera by CNN. Br. in Opp'n at 7. Yet that interview is not evidence of any conspiracy to violate the Bergers' rights; rather, McLean simply summarizes the government's purpose in allowing CNN to record the FWS search as educating the public that there are consequences, in the form of government enforcement, to

illegally poisoning protected wildlife.[2] ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 11/pages 2-8.

Other claims by the Bergers either are not borne out by the record,[3] or are irrelevant to the issues in this case.[4] For example, the Bergers' many complaints about the validity of the warrant and the conduct of the FWS officers, Br. in Opp'n at 4-6, if at all relevant, are misplaced. Before Paul Berger's criminal trial, a magistrate judge—fully aware of CNN's presence during the warrant's execution—specifically upheld the FWS search over Berger's motion to suppress. App. 7a-9a, 39a-41a, 52a-54a. Nor would it have been appropriate for the search warrant to authorize CNN to search the Bergers' ranch, as the Bergers suggest, Br. in Opp'n at 6: The CNN crew members were not law enforcement officials. They had no interest in—

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[2] "It is in fact a legitimate function of law enforcement to facilitate accurate reporting on law enforcement activities" because "the deterrence of crime [is] vital to the broader [law enforcement] mission." *Wilson*, 141 F.3d at 118 (citation omitted).

[3] CNN includes a more complete refutation of the Bergers' characterization of the facts in its Brief in Opposition to the Bergers' Conditional Cross-Petition for Writ of Certiorari (No. 98-38). As detailed with citations there, at 3-8, Paul Berger's consent to the search of his home is captured on tape; the CNN crew rode in its own vehicle and was dressed in a manner readily distinguishable from most of the government agents; the claimed threat of arrest is misleading and taken out of context; Berger admits on tape to killing every eagle he can; CNN used no hidden camera; and CNN has used this news footage only for its news programs, and not since 1994.

[4] The Bergers complain Berger was never read his *Miranda* rights, yet at no time was he under arrest. They criticize Hamann's introduction of his news report and allege McLean "disparag[ed]" them, yet the Bergers have not sued for defamation, or even alleged that anything CNN reported was false. (In any event, Hamann's statement about the number of eagles Berger had killed was based on Berger's own statements during the search, and was never included in the actual news programs; and McLean's recorded interview contains no derogatory statements. E.R. *Hamann* 5/8 *& Hanlon* 8/8/Tape 11/pages 2-4). The Bergers claim CNN was provided with "confidential" information, yet even if true, it is not unlawful for the news media to request or obtain such information.

and certainly did not engage in—searching for criminal evidence. As is typical with journalist "ride alongs" with law enforcement agents, CNN was there solely to cover news.

REASONS THE WRIT SHOULD BE GRANTED

1. The Bergers contend that CNN's independent "motive" for recording the Berger search was "irrelevant" to the state action analysis, but that its "conduct was dispositive." Br. in Opp'n at 12, 13. They are wrong on both counts. First, as to the relevance of CNN's motive or purpose, the Bergers misstate the holding of *United States v. Cleaveland*, 38 F.3d 1092 (9th Cir. 1994). *Cleaveland* in fact held that a private power company employee who searched for evidence of theft with police assistance was *not* a government actor, *specifically because the agent had a "legitimate, independent motivation"* for conducting a private search for evidence of a crime. *Id.* at 1094 (emphasis added). The case thus holds that private action undertaken for independent, private goals is not state action, fully supporting *CNN's* position. Furthermore, even under the Bergers' asserted test for determining the significance of motive in the state action analysis—"examin[ing] the relationship between the Government Agents and private party," Br. in Opp'n at 13—CNN's independent newsgathering purpose indicates it was not a state actor. Its relationship with the FWS was that of a news organization seeking and obtaining access to the activities of the subject of its reporting.

Also, even if the Bergers are correct that a private party's conduct is "dispositive" of the state action question, *id.*, CNN conducted itself as a private media entity whose actions were not "fairly attributable" to the government. *Lugar*, 457 U.S. at 937. It is undisputed that CNN was present at the Berger ranch not to search for criminal evidence, as was the government, but to report news. The footage of the search was not used in Berger's criminal trial, as footage recorded by the government might have been, but was used solely in CNN news programs.

The letter on which the Bergers and the Ninth Circuit so heavily rely was not a contract to *execute* a search—conduct that would be the province of government—but simply a statement that CNN could *watch* a search—journalistic conduct.

The Bergers attempt to explain away the Eighth Circuit's conflicting opinion in *Parker*, arguing the panel "did not conduct any state action analysis." Br. in Opp'n at 14. This is false. The lead opinion, joined by one concurring judge, specifically analyzed the state action question. 93 F.3d at 447-48. The court concluded the television news crew was not a state actor because its mission was distinct from that of the police, it was present for independent newsgathering purposes, and it did not assist police in their search—all of which also are true here.[5] Finally, other than pointing out the unsurprising fact that some of the cases cited in the Petition involve circumstances not identical to the present case, the Bergers fail to—and cannot—refute the well-established principle that private citizens do not act under color of law when they observe or accompany police for purposes independent of law enforcement. Br. in Opp'n at 15-16 (attempting to distinguish *Price v. Baker*, 693 F.2d 952 (10th Cir. 1982), *Jones v. Taibbi*, 508 F. Supp. 1069 (D. Mass. 1981), and *Freedman v. Coppola*, 614 N.Y.S.2d 833 (N.Y. App. Div. 1994)). The Bergers fail to cite any previous case in which journalists engaged in newsgathering were held to be state actors, and fail to refute the Petition's explanations of why the opinion below conflicts with established state-action principles.

Moreover, the Bergers cannot overcome CNN's independent motive by arguing "the evidence in the aggregate" justifies treating CNN as a government actor. Br. in Opp'n at 18. Indeed, the hodge-podge of "facts" the

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[5] The Bergers implicitly acknowledge the conflict between *Parker* and the Ninth Circuit's opinion in this case, arguing *Parker* would have been decided differently if only the Eighth Circuit "had . . . conducted the appropriate analysis." Br. in Opp'n at 15 n.20.

Bergers assert fails to show CNN shared a "common unconstitutional goal" with the FWS to search the Berger ranch in violation of the Fourth Amendment. *Id.* Most of the 14 asserted points demonstrate *not* that CNN should be treated as a state actor, but that CNN acted as journalists ordinarily do in arranging "ride alongs" with police to obtain access and information for news reports: CNN made prior arrangements to do so (points 2, 3, & 5). Furthermore, as the case law makes evident, Pet. at 13-14, 26-27, it is in no way unusual for reporters in such situations to be permitted to follow police as they enter private property, to record the police action, or to broadcast the resulting news footage (points 1, 8-11, & 13). None of this suggests CNN behaved in any way other than as private journalists. The remainder of the Bergers' litany consists either of actions undertaken by and attributable solely to the FWS, not to CNN (points 4 & 14), or mischaracterizations of facts not sustained by the record (points 6, 7, & 12).[6] The Bergers' blunderbuss presentation of the facts does not show CNN shared an unconstitutional goal with the FWS, but rather shows CNN's goal was to gather news and report on government efforts to combat environmental crimes.

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[6] CNN respected Paul Berger's right to a fair trial by agreeing not to show news footage of the search until that right could not be jeopardized. The Bergers' contortion of this into "evidence" of CNN's intent to violate their constitutional rights (point 6) is proof not of any "state action," but only of the extent of the Bergers' efforts to force the facts of this case to fit their theory. The record shows that CNN's "participation" at the pre-search briefing (point 7) was consistent with, and no more extensive than necessary to facilitate, its newsgathering purpose. Pet. at 5. Nor did CNN and the FWS "work together to deflect detection" of CNN (point 12): Berger has never alleged that CNN misled him about its identity or made any effort to hide its large, hand-held camera. Furthermore, the record shows no "diversion" when Berger objects to being filmed. Rather, it is Berger who immediately initiates a conversation with government poison specialists who had previously been searching his poison shed. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 8/page 13/Tape 21/page 3.

The Bergers also suggest CNN's conduct was state action because the news footage it recorded was "confidential" and obtained with the assistance of the FWS agents. Br. in Opp'n at 19-21. Clearly this cannot amount to "joint action"; otherwise, the news media would be subject to constitutional liability any time an official "leaked" government secrets or otherwise assisted the news media in obtaining information not readily available to the public. When journalists seek access to such information—with or without the assistance of government agents—they are not "state actors" who may be treated as government agents themselves; rather, they act as the press, in a manner the Constitution expects the press to act. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (praising as "courageous reporting" articles that relied on stolen and leaked classified Pentagon documents); Potter Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975) (Constitution contemplates news media will seek out confidential information). In contrast, the Bergers rely only on cases in which courts found the government properly *could refuse to release* certain secret information to the press. Br. in Opp'n at 20 (citing *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989) and *United States v. Capra*, 501 F.2d 267 (2d Cir. 1974)).[7] Neither case remotely suggests the news media engage in state action when they *do receive* such information from government, or even that it is unlawful for the government to provide the information.

2. Finally, the Bergers inexplicably contend that it is of no concern to the news media whether an otherwise proper search violates the Fourth Amendment when law enforcement agents allow journalists to observe it. CNN,

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[7] The Bergers' reliance on *dicta* in *Branzburg v. Hayes*, 408 U.S. 665 (1972) (reporter can be compelled to testify to grand jury), likewise is misplaced, because CNN does not claim a "constitutional right of special access to information not available to the public generally." Br. in Opp'n at 20. Instead, the issue is whether or not the Fourth Amendment applies to CNN.

in particular, certainly is concerned with the Ninth Circuit's determination that the search violated the Fourth Amendment, since an underlying constitutional violation is one of the two elements of *Bivens* liability.[8] The news media more generally are concerned with whether their presence at an otherwise permissible search violates the Fourth Amendment: If the Ninth Circuit opinion on this

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[8] The Bergers' defense of the Ninth Circuit's Fourth Amendment holding, Br. in Opp'n at 26-28, relies on cases and statutes irrelevant to the issue of media presence at a search. Contrary to the Bergers' suggestion, *id.* at 27, violation of 18 U.S.C. §§ 3105, 2234, 2236, or 3109, which govern federal agents' execution of warrants, does not invalidate agents' authority to be on the premises or to execute a valid warrant, and has *no* bearing on liability of third-party witnesses to a warrant's execution. All the cases the Bergers cite involve the conduct of officers and make no mention of third-party observers. *E.g., Lawmaster v. Ward*, 125 F.3d 1341 (10th Cir. 1997) (officers acted unreasonably in ransacking home; no third parties involved). Some actually permit conduct beyond that expressly authorized by the warrant. *E.g., Michigan v. Summers*, 452 U.S. 692 (1981) (detention of occupants permissible even where not expressly authorized by search warrant). Other cases cited involve third parties assisting police in actually searching for evidence; they thus are factually distinguishable, and in any event do not consider the effect of third-party *observers*. *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982) (state drug officers could assist federal agents in executing a search); *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980) (private security experts could assist police search). The Bergers cite *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), but ignore the Sixth Circuit's subsequent decision in that case, which held that the presence of a private third party at the execution of a warrant is not in itself unconstitutional. *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995).

Contrary to the Bergers' contention, *Moncrief v. Hanton*, 10 Media L. Rptr. 1620 (N.D. Ohio 1984) and *Higbee v. Times-Advocate*, 5 Media L. Rptr. 2372 (S.D. Cal. 1980), two early cases finding "ride alongs" constitutionally permissible, have not been "supersed[ed]" by *Soldal v. Cook County*, 506 U.S. 56 (1992), or *Winston v. Lee*, 470 U.S. 753 (1985). *Soldal* expressly rested on the Fourth Amendment's protection of *property* interests, not its privacy component. 506 U.S. 62 and n.7. In holding a compelled surgical procedure unconstitutional, *Winston* relied entirely on Fourth Amendment cases that predate *Higbee*, most by decades. 470 U.S. at 758-62.

issue is allowed to stand, media access to such government activities will be curtailed significantly.[9]

The Bergers do not even address the direct conflict, described in the Petition at 25-28, between the Ninth and Second Circuits on the one hand and the Fourth and Eighth Circuits on the other. The Bergers fail to cite the Fourth Circuit's recent 6-5 *en banc* opinion in *Wilson v. Layne,* 141 F.3d 111, which found, contrary to the Ninth Circuit, that permitting journalists to follow officers into a home and record the execution of a warrant violates no clearly established Fourth Amendment right. The plaintiffs in *Wilson,* who stand in the same position as the Bergers do in this case, recognized in their recent petition to this Court that the present state of the law is that media "ride alongs" with police "are clearly unconstitutional in the Second and Ninth Circuits, and not clearly unconstitutional, if unconstitutional at all, in the Fourth and Eighth Circuits." *Id.*, Pet. for Cert. at 12, —— U.S.L.W. —— (U.S. July 7, 1998) (No. 98-83).

CONCLUSION

In sum, the Brief in Opposition fails to address—much less refute—the reasons set forth in the Petition for granting the Writ of Certiorari. The Ninth Circuit's holding on both elements of *Bivens* liability—the "color of law" requirement and the underlying constitutional violation—conflicts with decisions of other courts of appeals and raises important questions that require this Court's review. Sup. Ct. R. 10(a), (c). The unsettled state of the law has left both journalists and police uncertain over the constitutionality of the not uncommon "parallel[] and contemporaneous" conduct, *Parker,* 93 F.3d at 448, that CNN and FWS engaged in here. The natural result of such uncertainty is that media access to government law enforcement activities will dwindle, and newsgathering will suffer, until this Court resolves the conflicting judicial views. CNN therefore respectfully requests that the Court grant its Writ of Certiorari.

---

[9] *See generally* Br. of *Amici Curiae* ABC, Inc., *et al.* in Support of Petitioners.

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No. 97-1914

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CABLE NEWS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; ROBERT RAINEY; DONALD HOOPER; AND JACK HAMANN,

Petitioners,

v.

PAUL W. BERGER; ERMA R. BERGER; UNITED STATES OF AMERICA; RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; AND KRIS A. MCLEAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF ABC, INC.; A.H. BELO CORPORATION; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION; CBS BROADCASTING INC.; THE COPLEY PRESS, INC.; FOX TELEVISION STATIONS, INC.; GANNETT CO., INC.; THE HEARST CORPORATION; KING WORLD PRODUCTIONS, INC.; THE LOS ANGELES TIMES; MAGAZINE PUBLISHERS OF AMERICA, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL BROADCASTING COMPANY, INC.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NEWSPAPER ASSOCIATION OF AMERICA, INC.; THE ORANGE COUNTY REGISTER; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; TRIBUNE COMPANY; AND UNIVISION TELEVISION GROUP, INC. IN SUPPORT OF PETITIONERS

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In the Supreme Court of the United States

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CABLE NEWS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; ROBERT RAINEY; DONALD HOOPER; AND JACK HAMANN,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

ABC, Inc., A.H. Belo Corporation, American Society of Newspaper Editors, California Newspaper Publishers Association, CBS Broadcasting Inc., The Copley Press, Inc., Fox Television Stations, Inc., Gannett Co., Inc., The Hearst Corporation, King World Productions, Inc., The Los Angeles Times, Magazine Publishers of America, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Cable Television Association, Inc., Newspaper Association of America, Inc., The Orange County Register, The Reporters Committee for Freedom of the Press, Tribune Company and Univision Television Group, Inc. respectfully move this Court for

leave to file the accompanying brief *amici curiae* in support of the Petition for a Writ of Certiorari in this case. All of the petitioners and all of the respondents other than Paul and Erma Berger have consented to the filing of the brief *amici curiae*. Respondents Paul and Erma Berger do not consent to the filing of the brief *amici curiae*.

The prospective *amici* and their members are publishers, broadcasters, editors and reporters working throughout the United States to gather news and information and to disseminate it to the American public. The prospective *amici* regularly report to the public about, among other matters, the activities of federal, state and local governments and their officials, including the performance by law enforcement agencies of their public duties. *See* Appendix A *infra*.

The decision of the United States Court of Appeals for the Ninth Circuit in this case purports to establish two extraordinary principles of law: (1) the mere fact that a news organization seeks and receives approval from a government agency to observe its officers performing their public functions renders the news organization a "government actor" for purposes of civil liability pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); and (2) permission granted by a government agency for reporters to observe law enforcement officers when they execute search warrants is a violation of the Fourth Amendment unless the presence of the news media is authorized in advance by a magistrate. The first of these novel constitutional principles is contrary to this Court's precedents defining what constitutes governmental action and greatly expands the universe of private conduct subject to constitutional scrutiny. The second principle stands in marked conflict with the holdings of other courts of appeals, leaving both law enforcement officers and the news media without a nationally applicable constitutional standard to which they may conform their conduct.

Unless the decision below is reversed, it is likely to curtail sharply the ability of the prospective *amici* to serve effectively as surrogates of the American people in observing and reporting to their fellow citizens about the activities of law enforcement officers and other government officials. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) (news media properly "function[] as surrogates for the public"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (public "relies necessarily upon the press" to report on operations of government and "[g]reat responsibility is accordingly placed upon the news media" to fulfill this role); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (the press "stands as one of the great interpreters between the government and the people"). Thus, the prospective *amici* possess an abiding interest in ensuring that the Court has an opportunity to review the full implications of the decision below.

The accompanying brief *amici curiae* addresses at least three significant matters relevant to this Court's consideration of the Petition for Writ of Ceritorari not previously brought to its attention:

(a) the significant public purposes served by the kind of newsgathering and reporting at issue in this case;

(b) specific examples of the benefit that has accrued to the public through the journalistic methods effectively condemned by the Court of Appeals; and

(c) the deleterious effect the currently conflicting rulings of the courts of appeals will have on the ability of news organizations to observe and report upon government activity at all levels.

Accordingly, because these matters affect not only the interests of the prospective *amici*, but also the interests of the American public in the free flow of information concerning the conduct of its government, the prospective

amici respectfully request that this Court grant them leave to file the accompanying brief *amici curiae*.

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BRIEF OF *AMICI CURIAE* ABC, INC., *ET AL.* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici and their members are publishers, broadcasters, editors and reporters working throughout the United States to gather news and information and to disseminate it to the American public by, among other means, observing public officials—including law enforcement officers interacting directly with the public—as they perform their governmental functions. *See* Appendix A *infra*. The decision below effectively condemns this form of news reporting and, unless reversed by this Court, threatens to frustrate the ability of *amici* to fulfill their historic role as "the great interpreters between the government and the people." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).[1]

SUMMARY OF ARGUMENT

The decision below purports to establish two novel rules of constitutional law. According to the Ninth Circuit, an agreement between the government and a news organization to permit a reporter to be present during execution of a search warrant renders the news organization a "joint actor" with the government and thereby subjects it to constitutional liability under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Furthermore, according to the Ninth Circuit, the news media's presence during execution of a search warrant violates the Fourth Amendment—at least if not approved in advance by the magistrate issuing the warrant.

To hold, as the Ninth Cicuit has, that the press becomes a joint actor with the government simply because it obtains access by agreement to a particular government undertaking vastly enlarges the scope of this Court's "gov-

[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

ernmental action" doctrine, which heretofore has been narrowly crafted. Moreover, in practical terms, the Ninth Circuit's twin holdings will effectively curtail a valuable form of reporting that has long served the constitutionally protected function of bringing public scrutiny to bear on official conduct. Such reporting both increases confidence in the criminal justice system and furthers other salutary public purposes. The Ninth Circuit's contrary conclusion—that such news coverage is nothing more than "entertainment" produced for "commercial" purposes—is squarely at odds with this Court's constitutional jurisprudence. Furthermore, the decision below conflicts with a decision of the Eighth Circuit and caps a series of confusing and often contradictory rulings from other circuits, leaving news organizations and law enforcement entities without a nationally applicable standard to which they can conform their conduct.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW EXPANDS THE DOCTRINE OF GOVERNMENTAL ACTION AND SEVERELY RESTRICTS THE MEDIA'S ABILITY TO FULFILL THE CRITICAL ROLE PERFORMED BY NEWS COVERAGE OF LAW ENFORCEMENT ACTIVITIES

The Ninth Circuit's decision effectively converts a private news organization such as CNN into a governmental actor whenever it seeks and obtains permission to observe public officials performing their duties. The holding conflicts with this Court's jurisprudence concerning the scope of the "governmental action" doctrine and threatens the ability of the American press to report to the public about a vast spectrum of government activity. Other courts, including the Eighth Circuit, have expressly held that a private news organization, acting to fulfill the public's interest in newsgathering, does not become a joint actor with government simply by virtue of being permitted by public officials to obtain access to the scene of governmental activity. The Ninth Circuit's decision to the contrary not only will deprive the public of a valuable source

of vital information about the government's enforcement of the law (and a means by which the public's confidence in the justice system may be maintained), it also frustrates, from the point of view of law enforcement, the pursuit of other valuable and wholly legitimate public purposes.[2]

A. Deeming A News Organization A Governmental Actor Because It Obtains Permission To Observe Public Officials Performing Their Duties Conflicts With Decisions Of This Court And Other Courts Of Appeals

The Ninth Circuit held that CNN may be liable in damages under the Fourth Amendment because its reporters and agents of the U.S. Fish & Wildlife Service "acted together" in "conduct[ing] a search" of Paul and Erma Berger's ranch pursuant to a warrant. *Berger v. Hanlon*, 129 F.3d 505, 515-16 (9th Cir. 1997). The court below rested this conclusion on a one-page letter specifying the terms under which CNN would be permitted to observe execution of the warrant. Set forth in full by the court below, *id.* at 508, the letter contains only two material terms: (1) CNN reserved absolute editorial control over the fruits of its newsgathering and (2) CNN indicated it would withhold telecast of the footage so obtained until such time as disseminating it would not interfere with Mr. Berger's right to a fair trial. The Ninth Circuit deemed this "agreement" to constitute a blueprint for CNN's " 'inextricable' involvement" with "both the planning and execution of this search." *Id.* at 515.[3] Its fur-

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[2] Like the petitioners, *amici* are concerned here only with the imposition on the news media of liability for constitutional violations on a theory of "joint action" with the government. The Bergers brought a number of other, non-constitutional claims against CNN and its reporters, including for trespass, none of which are implicated by the Petition or the arguments made herein, and upon the merits of which the *amici* express no view.

[3] The Ninth Circuit also noted that, as alleged by the Bergers, CNN reporters "participated in a pre-search briefing the day before the search, at which the federal [law enforcement officers] shared with the media details" of the warrant and the planned search. *Berger v. Hanlon*, 129 F.3d at 509. If such routine, passive news-

ther conclusion that such an "agreement" constitutes "governmental action" for purposes of *constitutional* liability cannot be squared with this Court's precedents.

As the Court has cautioned, private parties are not liable for the deprivation of constitutional rights unless their conduct is "fairly attributable" to the government. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Indeed, in a recent decision—one that expressly honors this Court's reluctance to expand the scope of private conduct constituting governmental action and that, consequently, reaches a result that is contravened by the decision below—the Eighth Circuit dismissed section 1983 claims against a television station arising from nearly identical circumstances. *See Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).[4]

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gathering constitutes joint "planning" with public officials, as the Ninth Circuit asserted, *see id.* at 510, 512, there is virtually no circumstance in contemporary coverage of formal government actions in which the news media would *not* qualify as governmental actors. *See, e.g.*, Jim Newton, *L.A.'s Disaster Officials Gather to Build on the Past*, L.A. Times, Dec. 13, 1997, at B1 (reporter invited to attend conference of disaster response officials reporting on plans to improve emergency response); Edith M. Lederer, *1,000 Raids on Iraq; Second Wave Hits Iraqis*, Phila. Daily News, Jan. 17, 1991, at 3 (reporters permitted to attend Department of Defense briefings on military operations in Persian Gulf). *Amici* respectfully submit that the Ninth Circuit ignored the critical difference between observing and questioning governmental action as the eyes and ears of the public, and actually participating in such action. *Compare Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996) (reporters who observed execution of warrant for purpose of gathering news are not joint actors with government agents), *cert. denied*, 117 S. Ct. 1081 (1997) *with Buonocore v. Harris*, 65 F.3d 347, 350 (4th Cir. 1995) (third-party owner of allegedly stolen property who actively engaged in search of premises for property is joint actor with government agents executing warrant).

[4] In actions brought pursuant to 42 U.S.C. § 1983, the operative question is whether the private party acted "under color of state law," a standard that has been treated as synonymous with the test for "governmental action" applicable in the context of a *Bivens* claim such as that asserted here. *See, e.g., Butz v. Economou*, 438 U.S. 478, 500-01 (1978) (same standards under both section 1983

In that case, a reporter for St. Louis television station KSDK contacted law enforcement officials, advised them that he was developing a television news report about the government's attempt to control illegal weapons, and was thereafter granted permission to accompany officers as they undertook a particular enforcement action. *Id.* at 446. The news crew rode to the scene of the investigation in a squad car and followed police officers into the subject's home with cameras as the officers executed a warrant. *Id.* at 446-47. Subsequently, news reports including videotape of the search were broadcast to the public. *Id.* at 447.

Unlike the court below, the Eighth Circuit rejected the contention that such facts are sufficient to render KSDK and its reporter joint actors with the police. As the Eighth Circuit observed in words that apply with equal force to the present case:

> [N]either KSDK nor the police assisted the other in the performance of their separate and respective tasks. The KSDK personnel did not execute the search warrant and they entered the house after the police did. The television station was there for reasons of its own and was engaged in a mission entirely distinct from the one that brought the police to the house.

Id. at 448. The Eighth Circuit recognized that, " 'at most, [the television station's] acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant.' " *Id.* at 448 (quoting *Parker v. Clarke*, 905 F. Supp. 638, 642 (E.D. Mo. 1995)).[5]

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and *Bivens*); *Lugar v. Edmondson Oil Co.*, 457 U.S. at 924, 928-29, 935 (same).

[5] The Eighth Circuit reached an analogous conclusion in *Buford v. Tremayne*, 747 F.2d 445, 446 (8th Cir. 1984), a section 1983 action instituted by a state court judge against a variety of law enforcement and other officials, a newspaper and one of its reporters. The plaintiff alleged that the officials had conspired with the news media to publicize allegations of misconduct in order to

Like the Eighth Circuit, other courts confronted with section 1983 claims against the news media have recognized that deeming the press to be a joint actor with the government as the result of newsgathering activity is inconsistent with both the constitutional role envisioned for and the very nature of the journalistic enterprise. Consequently, these courts, too, have dismissed such claims because the media's conduct cannot fairly be attributed to the government. For example, in *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980), a former Houston fire chief and two firefighters brought claims under section 1983 against various city officials, an assistant district attorney, the *Houston Post* and one of its reporters. The *Post* had published a series of investigative reports about corruption in the Houston Fire Department and, subsequently, the chief and two firefighters were indicted but acquitted on various charges of misuse or theft of departmental property. *Id.* In their section 1983 action, the three alleged a conspiracy between city officials and the press to discredit the former chief's administration. The allegedly improper acts undertaken in furtherance of the "conspiracy" apparently included the assistant district attorney's pretrial briefings to the reporter and other news media personnel, and the reporter's conduct of interviews with city officials and receipt from them of pertinent documents. *See id.* at 793-94 & nn. 2-3. The district court granted the news media defendants' motion for summary judgment and the Fifth Circuit affirmed. As the court of appeals explained, there was no evidence that the media defendants "were doing anything other than their normal jobs as a newspaper and a reporter" and such activity could not form the basis of a claim that the media defendants were acting in concert with government offi-

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have him removed from office. *Id.* at 446-47. The reporter acknowledged that he had " 'tried to interview representatives of the judicial commission, its staff and attorneys' " about the charges. *Id.* at 447. The Eighth Circuit concluded that the reporter "acted only in his professional capacity as a reporter, and [that this] negates any inferences of conspiracy or conspiratorial motives" necessary to constitute joint action for purposes of section 1983 liability. *Id.*

cials in a manner sufficient to give rise to liability under section 1983. *Id.* at 794 n.3.

By the same token, in *Brooks v. American Broadcasting Cos.*, 737 F. Supp. 431, 433 (N.D. Ohio 1990), *aff'd in part and vacated in part on other grounds*, 932 F.2d 495 (6th Cir. 1991), the plaintiff sought to amend his complaint to add claims under sections 1981, 1983 and 1985 against ABC and various Ohio officials arising from an interview and broadcast in which that network allegedly suggested that the plaintiff had served as an " 'enforcer' " or " 'hitman' " for a state judge indicted on criminal charges. The plaintiff's proposed amended complaint alleged that ABC had conspired with government officials to deprive him of his right to privacy and, in particular, that Ohio officials had given ABC "access to official investigatory materials in preparing their broadcast." *Id.* at 438-39, 440. In a holding not challenged before the Sixth Circuit, the district court refused to permit the amendment on the ground that it was rendered futile by plaintiff's inability to allege the requisite governmental action, since "[t]he facts as alleged merely demonstrate defendants were acting as any news reporting organization does and this does not constitute state action." *Id.* at 440. As the district court further explained:

> News reporters often have access to official reports and documents to aid them in investigating and preparing a story, yet that alone does not convert these acts into state action. To hold otherwise would be to render many actions by news agencies state actions and this would dilute the historic disassociation between the news media and the government.

Id. (citing *Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470, 474 (7th Cir. 1970)).[6]

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6 Likewise, in *Mimms v. Philadelphia Newspapers, Inc.*, 352 F. Supp. 862 (E.D. Pa. 1972), an inmate brought section 1983 and 1985 claims against the prison warden, a newspaper, its reporter and a photographer based on publication of an article and the plaintiff's photograph without his consent. The court concluded that plaintiff had not and could not allege state action on the part

These cases stand for two previously accepted principles: (1) the gathering and dissemination of news to the public about government conduct is an enterprise distinct from, even if it sometimes occurs parallel to, the function of the government itself in undertaking such conduct, and (2) that the government provides a news organization with access to particular events or with information and documents in anticipation of news coverage amounts neither to a "conspiracy" between the press and the government nor to the kind of concerted action toward a common goal that effectively conflates the two into one governmental actor. The Ninth Circuit rejected these well-grounded principles when it concluded that CNN had engaged in joint action with the Fish & Wildlife Service sufficient to convert its reporters' routine newsgathering efforts into conduct attributable to the government. *See Berger v. Hanlon*, 129 F.3d at 515. As the above-cited and other authorities recognize, the historic disassociation between the government and the press renders them *independent* actors, even when pursuit of their respective goals leads to some degree of interaction. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987) ("Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government."); *Mimms v. Philadelphia Newspapers, Inc.*, 352

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of the news media defendants, *notwithstanding* that the reporter and photographer were admitted to the prison by the warden and could only have obtained the information published with his assistance, because they were "newspaper people whose orbit is far from the governmental sphere and, by virtue of the first amendment, essentially insulated from it." *Id.* at 865; *see also, e.g., Fitzpatrick v. Wert*, 432 F. Supp. 601, 603 (W.D.N.Y. 1977) (dismissing action under sections 1983 and 1985 against newspaper reporter and publisher because plaintiff's theory that "by reporting the news and providing editorial comment on current events, [they] were thereby involved in a conspiracy to deprive plaintiffs of equal protection of the laws . . . borders on the preposterous"); *cf. Zerilli v. Evening News Ass'n*, 628 F.2d 217, 224 (D.C. Cir. 1980) ("[t]he values served by a free and vigilant press militate against" imposing *Bivens* liability on news organizations).

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F. Supp. at 865 (that reporter could only have obtained access to information through assistance of state official did not render reporter actor under color of state law).[7]

The ramifications of the Ninth Circuit's contrary reasoning are far-reaching. Certainly, the Ninth Circuit's rationale cannot logically be confined to the technique of "ride-along" reporting on law enforcement actions. Reporters who obtain permission to observe conditions in hospitals operated by the Department of Veterans Affairs or who are permitted to monitor disaster relief efforts undertaken by the Federal Emergency Management Agency—circumstances in which it often is impossible for reporters to obtain access to the scene of newsworthy events without the advance agreement of the government—would apparently qualify as "governmental actors" under the Ninth Circuit's reasoning.[8] War correspondents who obtain per-

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[7] The Fish & Wildlife Service is not the only governmental agency to recognize the public's right to information about its enforcement activities. For example, the Los Angeles Police Department observes in its manual that "[c]rime, its results, and the efforts to combat it are all matters of continuing public concern" and the "press serves the public by supplying needed information, by stimulating thought, and by providing a medium for expression." *Manual of the Los Angeles Police Department*, § 420.10 (1992). The *Manual* continues, "[t]he Department is regularly involved in events at which members of the news media are properly present and performing their task of gathering information." *Id.* Indeed, the *Manual* specifies procedures for approving requests from the news media to accompany police officers as they perform their duties. *Id.* § 280. Under the Ninth Circuit's reasoning, it appears that every reporter who seeks and obtains permission to observe L.A.P.D. officers would become a "joint actor" with the government, subjecting the news media to liability for wrongs committed by an officer they are observing. The disincentive to news coverage of law enforcement agencies and their officers created by the decision below is evident.

[8] That such reporting serves the public interest cannot be disputed. *See, e.g.*, Joel Thurtell & Christopher Scanlan, *Room Left Veteran Ashamed to Have Visitors*, Detroit Free Press, June 25, 1989, at 1B (detailing unsanitary and unsafe conditions in VA hospital); Wes Conrad, *Veterans' Hospital is Not at Fault in Choking Death, Its Officials Say*, Phila. Inquirer, Mar. 2, 1995, at B4

mission to accompany troops in the field, and who are required to agree to a host of conditions on their conduct, would apparently also be deemed joint actors with the military.[9] Even the agreements that permit television coverage of the United States Congress could, by the Ninth Circuit's lights, convert the press into a joint actor with the House and Senate, while conditions placed on television coverage of trials, which typically regulate the number and placement of cameras, similarly could transform the press into a joint actor with the courts.[10]

In the last analysis, it simply cannot be said that the Fish & Wildlife Service " 'exercised [such] coercive power or has provided such significant encouragement, either

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(reporting on death in VA hospital attributed to lack of adequate care); Antoinette Martin, *Ghost Story: If He Could See What has Become of His Life, Jack Walker Would Just Die*, Detroit Free Press, July 8, 1990, Magazine at 6 (reporting VA hospital's role in wife's unsuccessful effort to enforce husband's living will); *Twister Levels South Dakota Town*, Associated Press, June 1, 1998, at A3 (reporting that FEMA teams were enroute to assist residents of town destroyed by tornado); *3 Offices Open Today for Flood, Tornado Aid*, Lexington Herald-Leader, May 9, 1998, at C3 (reporting that FEMA field offices would open to provide financial and other assistance to victims of storms).

[9] *See, e.g., Pentagon Panel Weighs Press Access*, Boston Globe, Feb. 6, 1984, at 1 (panel composed of former war correspondents, military officials and academics appointed to promulgate "formal procedures for reporters and photographers who accompany troops in combat missions" holds hearings); *News Pool Is Okd to Go With Forces on Military Actions*, Phila. Inquirer, Oct. 12, 1984, at A2 (as adopted, rules governing press access to military operations include, *inter alia*, requirement that reporters undergo periodic training exercises with military in order to participate in press pool); Molly Moore, *Long-Secretive U.S. Military has Turned Image-Conscious*, Wash. Post, Sept. 19, 1990, at A18 (describing reporters' unprecedented degree of access to military officials and operations in field during build-up to Gulf War and noting that military invited such coverage).

[10] *See, e.g., Leaders Praise Senate TV and Predict It Will Stay*, San Jose Mercury News, June 3, 1986, at 3A (discussing public benefits derived from Cable-Satellite Public Affairs Network's coverage of Senate proceedings and comparing same to CSPAN's long-standing coverage of House proceedings).

overt or covert, that the choice' " made by CNN to gather material for a news report about enforcement of environmental laws—particularly where, as here, CNN reserved to itself the decision whether to broadcast any such report—" 'must in law be deemed to be that of the [Service].' " *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 546 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)). CNN's decision to pursue and the means by which it prepared its news report "simply is not a governmental decision" and the fact that the Service—which, other than granting access to the law enforcement action, played no role whatsoever in preparation of subsequent news reports—acquiesced in CNN's newsgathering activities "is not enough to make [CNN's] actions those of the Government." 483 U.S. at 547 (citing *Blum v. Yaretsky*, 457 U.S. at 1004-05).[11]

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[11] The Ninth Circuit's contention that CNN's status as a for-profit business somehow dissipates the deference otherwise due its journalistic conduct is particularly misplaced. Speakers who seek payment for their speech—as is the case with most news organizations, including CNN—neither sacrifice their First Amendment rights nor thereby render themselves more vulnerable to being deemed "governmental actors": "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment" and there is no reason "why operation for profit should have any different effect in the case of motion pictures." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *see also, e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)). That the commercial news media, which receive no financial support from government, seek to generate revenue plays no proper role in evaluation of their conduct as it relates to the government.

B. The Ninth Circuit's Holding, That Inviting The News Media To Observe The Execution Of A Search Warrant Is Unreasonable Under The Fourth Amendment, Will Foreclose First-Hand News Reports Of Law Enforcement Activities And Will Deprive The Public Of Valuable Information About The Functioning Of Its Government

Based upon the Fish & Wildlife Service's agreement to permit CNN's reporters to observe its execution of a search warrant at the Bergers' ranch, the Ninth Circuit concluded that the search "[w]as one that at all times was intended to serve a major purpose other than law enforcement." *Berger v. Hanlon*, 129 F.3d at 510. Thus, although the search in all other respects comported with the Constitution, *see id.* at 509, because the news media's planned presence had not been disclosed to the magistrate before he issued the warrant, the Ninth Cicuit concluded that the search violated the Fourth Amendment, *id.* at 508-09, 510-11.[12]

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[12] The Ninth Circuit's suggestion that reporters properly might be permitted to observe the execution of warrants if the government first obtains approval for the news media's presence from a magistrate is especially troubling. According to the court below, a judicial officer apparently must determine whether a particular search or arrest is appropriately of concern to the public, and then supervise the activities of the news media in the same way that the magistrate would oversee the conduct of law enforcement officers, including, presumably, enforcing the news media's performance of "authorized" news reporting activities. But, as this Court admonished in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), "treatment of public issues and public officials—whether fair or unfair—constitute[s] the exercise of editorial control and judgment" and "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with [the] First Amendment." *See also e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973) ("we reaffirm unequivocally the protection afforded to editorial judgment"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (questioning "wisdom" of requiring courts "to decide on an *ad hoc* basis" which news stories are properly the subject of public interest).

If permitted to stand, the Ninth Circuit's decision will have one overriding effect: To avoid the prospect of a ruling that their officers have violated the constitutional rights of suspects, witnesses and other participants in the criminal justice system, law enforcement agencies at all levels will refuse to permit the news media to observe their activities including, but not limited to, their execution of warrants. Indeed, from the point of view of news organizations, which under the Ninth Circuit's "joint action" ruling would apparently be subject to joint liability for all constitutional violations committed by law enforcement officers, the decision below stands as a powerful disincentive to first-hand reports of official conduct. Under such a regime, the public would be deprived of its principal objective source of information about government activities—a source that has, over the years, yielded news reports of undeniable public benefit. Such a disincentive to speech about matters of public concern is antithetical to this Court's First Amendment jurisprudence.[13]

In this case, footage of the Berger search was included by CNN in news reports, telecast on two of CNN's environmental news programs, concerning the government's ability to enforce wildlife protection laws. *See* Excerpts of Record 8-2, 8-9 (*Berger v. Hanlon*, No. 96-35251 (9th Cir.)); Excerpts of Record 5-2, 5-9 (*Berger v. Cable News Network, Inc.*, No. 96-35266 (9th Cir.)). The government's enforcement of such laws is unquestionably a matter of public concern. "Commentary and reporting on the criminal justice system is at the core of First

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[13] *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 378-79 & n.12 (1984) (if evidence demonstrated that "fairness doctrine" imposed on broadcasters by FCC "effectively chill[ed] speech," Court would be required to reconsider its decision upholding doctrine against First Amendment challenge). Indeed, this Court recently reversed the decision of another court of appeals on analogous grounds. *Arkansas Ed. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1643 (1998) (noting that, "as a direct result of the Court of Appeals' decision" that public television stations could be liable under First Amendment to political candidates excluded from debates, at least one such debate was canceled).

Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring). Indeed, the public's "deserved right to know" about the criminal justice system includes not just proceedings in the nation's courtrooms, but "the prosecution of local crimes in particular" and "the conduct of . . . the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring).

Other valuable reporting that could not have been undertaken without first-hand access to law enforcement activity is legion, including, for example:

- A *Los Angeles Times* reporter, investigating the ability of state police to locate and apprehend sex offenders, accompanied officers as they sought to arrest a convicted child molester, during which process the reporter observed first-hand how easily such offenders can elude police. Jeff Leeds & Nicholas Riccardi, *Missing Molester Tracked Down*, L.A. Times, Jan. 31, 1997, at B1.
- By accompanying state and federal agents as they investigated a fraudulent scheme involving cellular phones programmed with stolen identification numbers, television reporters were able to present the public with first-hand observations concerning the scheme and how consumers could avoid it. *Prime Time Live: Sorry, Wrong Number* (ABC television broadcast, Sept. 25, 1996).
- Television reporters observed the work of a homicide detective squad for approximately one month in order to present a comprehensive report on the ability of police to solve murders. *ABC News Turning Point: Solving Murder Kansas City Style* (ABC television broadcast, June 29, 1994).
- In a landmark program, CBS news reporters accompanied law enforcement officers during a 48-hour period in order to document how police dealt

with the development of "crack" cocaine. *CBS News Special: 48 Hours on Crack Street* (CBS television broadcast, Sept. 2, 1986).

- Turning his beat reporting into a book-length account, a newspaper reporter observed two detectives assigned to a homicide division carry out their investigations over a period of months and accompanied them as they executed warrants, resulting in a detailed exploration of the reasons for Los Angeles' high rate of unsolved homicides. Miles Corwin, *The Killing Season: A Summer Inside an LAPD Division* (Simon & Schuster 1997).

Indeed, CNN itself has produced a number of critically acclaimed telecasts employing analogous newsgathering techniques. These include, for example, *The Misery Trade,* which documented the horrifying illegal conditions endured by many unskilled laborers. This award-winning report would not have been possible absent the opportunity to observe raids on sweat shops pursuant to warrants and, thereby, to witness and record the circumstances of the workers. *See CNN Special Assignment: The Misery Trade* (CNN television broadcast, Dec. 5, 1993) (winner, Sixteenth Annual Cable ACE Award for Short-Form Program Specials).

As this Court repeatedly has emphasized, newspaper and television journalists properly "function[] as surrogates for the public." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 572-73. Because the American public "relies necessarily upon the press" to report on the operations of government, "[g]reat responsibility is accordingly placed upon the news media" to fulfill this role. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491-92 (1975). The species of news reporting at issue here serves to enhance the performance of government officials whose conduct may be observed, and as both the catalyst and raw material of informed public debate. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 570-74. The absence of such public scrutiny "breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law" and, consequently, access to the workings

of the criminal justice system "is essential . . . to achieve the objective of maintaining public confidence in the administration of justice." *Id.* at 595 (Brennan, J., concurring); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-09 (1984) (public scrutiny serves important structural function of promoting confidence in judicial system); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 492 (same); *In re Oliver*, 333 U.S. 257, 270 (1948) (same).[14]

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[14] CNN's presence during execution of the search warrant at issue served other important purposes. As the Ninth Circuit noted, the Fish & Wildlife Service permitted CNN to observe its officers as they executed an otherwise valid search warrant because "the government wanted to publicize its efforts to combat environmental crime." *Berger v. Hanlon*, 129 F.3d at 508; *see also id.* at 507. Such "publicity" advances legitimate goals of the criminal justice system, including that of deterrence. As a practical matter, "[i]f a given policy is to have a deterrent effect, offenders and potential offenders need, by definition, to know what that policy is." David M. Kennedy, *Guns & Violence: Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. Univ. L. Rev. 449, 463 (1997); *see also, e.g.*, Robert J. Owens, *Local Environmental Prosecutions: Coordinating Law Enforcement and Regulatory Agency Resources*, 7 Fordham Envtl. L.J. 909, 923 (1996) ("the deterrent value of a successful and publicized sting operation is inestimable" because "[i]ndividuals contemplating the commission of an environmental crime in a particular community may change their minds" if publicity makes clear that they may be dealing with undercover officers or that their illegal actions may be videotaped); Roscoe B. Starek, III & Lynda M. Rozell, *The Federal Trade Commission's Commitment to On-Line Consumer Protection*, 15 J. Marshall J. Computer & Info. L. 679, 687 (1997) (FTC increasingly relies on highly publicized enforcement "sweeps" targeting single type of illegal activity which "results in greater publicity for law enforcement actions that, in turn, increases consumer awareness of fraud and deters fraudulent marketers"); William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, in 15 MODERN POLICING 231, 255 (Michael Tonry & Norval Morris eds. 1992) (publicity given to successful police operations "can often translate into a range of tangible benefits, including greater public cooperation with police and better fiscal support from local, state, and national funding sources"); *Safety Checkpoints for DWI Enforcement*, U.S. Dep't of Transp. Nat'l Highway Traffic Safety Admin. Office of Alcohol Countermeasures

Put simply, the Ninth Circuit's ruling that it is unreasonable under the Fourth Amendment for law enforcement officials to permit the news media to be present during the execution of a search warrant will inevitably cause law enforcement agencies to deny such access. The Constitution neither requires nor anticipates such a result. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 572-73; *Grosjean v. American Press Co.,* 297 U.S. at 250.

II. THE DECISION BELOW DEEPENS A CONFLICT AMONG THE CIRCUITS THAT LEAVES NATIONAL NEWS ORGANIZATIONS AND LAW ENFORCEMENT AGENCIES WITHOUT A UNIFORM CONSTITUTIONAL STANDARD TO WHICH THEY CAN CONFORM THEIR CONDUCT

As discussed in the preceding section, with the decision below, the Ninth Circuit has now effectively declared that permitting the news media to observe the execution of a search warrant is unreasonable and, therefore, a violation of the Fourth Amendment. *Berger v. Hanlon,* 129 F.3d at 512. While this constitutional standard now governs the nine states that comprise the Ninth Circuit, the decisions of other circuits on the same point are neither clear nor uniform, subjecting both the press and law enforcement officials to uncertain and inconsistent standards of liability.

In *Parker v. Boyer,* 93 F.3d 445 (8th Cir. 1996), *cert. denied,* 117 S. Ct. 1081 (1997), for example, the Eighth Circuit observed that it is *not* "self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant." *Id.* at 447. Rather, as the Eighth Circuit pointed out, "most courts have rejected the argument that the United States Constitution forbids the media to encroach on a person's

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(1983) (publicity about law enforcement roadblocks is "the chief means of deterring driving while intoxicated") (*cited in People v. Scott,* 473 N.E.2d 1, 4 (N.Y. 1984)).

property while the police search it." *Id.* (citing *Avenson v. Zgart*, 577 F. Supp. 958 (D. Minn. 1984); *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980)).

In the Second Circuit, in contrast to the Eighth, Secret Service officers have been held not entitled to qualified immunity for permitting a CBS news crew to accompany them when they executed a search warrant because, according to that court, it was "clearly established" at the time of the search that such conduct violated the Fourth Amendment. *Ayeni v. Mottola*, 35 F.3d 680, 686 & n.8 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995). The Sixth Circuit, in turn, has criticized the Second Circuit's reasoning as vague and theoretically unbounded. *Bills v. Aseltine*, 52 F.3d 596, 602-03 (6th Cir.), *cert. denied*, 116 S. Ct. 179 (1995); *see also Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996) (where warrant made no mention of news media but authorized police to videotape search, subject's rights were not violated when police invited news media along and permitted them to make their own videotape of search).

Adding to the confusion, the *en banc* Fourth Circuit has recently entered the fray as well, a bare majority of that court concluding that a decision by federal marshals and state sheriff's officers to permit news media to accompany them when executing an arrest warrant did *not* violate any clearly established Fourth Amendment principle. *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998). In *Wilson*, federal and state law enforcement officials were engaged in a joint operation to apprehend violent fugitives. The United States Marshals Service had a written policy permitting members of the news media to "ride along" with officers for the purpose of observing and recording operational missions. *Id.* at 113 n.3. Pursuant to this policy, two *Washington Post* reporters, one with a camera, were permitted to accompany officers as they executed an arrest warrant at the suspected residence of

the fugitive. *Id.* at 113. The six judges in the Fourth Circuit's majority observed:

> [R]easonable law enforcement officers might conclude that permitting media representatives to observe and photographically record the execution of an arrest warrant does serve [a legitimate law enforcement] purpose. For example, the purpose may be served by affording protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of recorded evidence of his actions. Additionally, it could be asserted that facilitating accurate reporting that improves public oversight of law-enforcement activities is a legitimate law enforcement purpose because it deters crime, as well as improper conduct by law enforcement officers.

Id. at 116. Five judges dissented from this view. Rejecting the suggestion that the presence of the news media served any purpose, the dissenters would have held, as the Ninth Circuit did here, that the presence of the *Washington Post's* reporters was unreasonable under the Fourth Amendment. *Id.* at 120 (Murnaghan, J., dissenting).

In short, the law governing the precise conduct at issue in this case is in conflict and, absent intervention by this Court, the resulting confusion is likely only to intensify. As the dissenters in *Wilson* observed, "[t]he majority's *en banc* opinion adds our Circuit's voice to the split between the Second and Ninth Circuits on the one hand and the Eighth Circuit on the other. Given the prevalence of real-life police dramas on television, other circuits will face this question soon enough." *Id.* at 132 (Murnaghan, J., dissenting). In the wake of these conflicting authorities, both the press and law enforcement officials are now subject to uncertain and inconsistent standards of liability. *Amici* and their reporters, editors and producers, like many news organizations, operate on a national basis. Without a uniform constitutional standard to which they may conform their conduct, both the press and government officials are placed in serious jeopardy when news organizations undertake what, in many lower courts, has been held to constitute lawful and valuable newsgathering

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activity. This Court's guidance is both necessary and desirable in order to eliminate the substantial disarray in which the law now stands. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. at 343 (in context of First Amendment, "unpredictable results and uncertain expectations" are to be avoided and it is responsibility of Supreme Court to "lay down broad rules of general application").

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the Petition for Writ of Certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APENDIX A

IDENTITY OF INDIVIDUAL *AMICI CURIAE*

ABC, Inc., an indirect wholly-owned subsidiary of The Walt Disney Company, is a broad-based communications company with significant holdings here and abroad. It alone, or through its subsidiaries, owns the ABC Television Network, ten television stations and 28 radio stations.

A.H. Belo Corporation, a publicly-traded (NYSE) company, has numerous wholly-owned subsidiaries, including subsidiaries which operate the *Riverside Press-Enterprise* newspaper in Riverside, California, and KXTV in Sacramento, California; KING-TV in Seattle and KREM-TV in Spokane, Washington; and KGW-TV in Portland, Oregon.

The American Society of Newspaper Editors is a professional organization of more than 900 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The California Newspaper Publishers Association represents approximately 500 daily and weekly newsaper members and for over 100 years has stood for the right of every individual to participate in the constitutional guarantee of freedom of expression.

CBS Broadcasting Inc., a New York corporation, is a wholly-owned, indirect subsidiary of CBS Corporation. CBS is engaged in the business of producing and broadcasting nationally news and public affairs programming, and operating 14 television stations and 171 radio stations across the country. CBS also owns several cable entities.

The Copley Press, Inc. publishes ten daily newspapers, including *The San Diego Union-Tribune*, whose combined circulation exceeds 500,000 copies, and it operates a national news service.

Fox Television Stations, Inc. ("FTS") owns and operates 22 television stations in major markets. Twenty-one

of the Fox Television Stations broadcast local news and news-related programs several times daily which are an integral part of their schedule. The Fox News Edge distributes a national news service to the FTS stations, as well as Fox Broadcasting Company affiliates and other subscribers.

Gannett Co., Inc. is a diversified news and information company that publishes 91 daily newspapers including *USA Today* and a variety of non-daily publications including *USA Weekend*, a newspaper magazine. Gannett also operates 18 television stations and a national news service.

The Hearst Corporation ("Hearst") is a diversified privately held communications company that publishes newspapers, consumer magazines, books and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

King World Productions, Inc. is a leading worldwide distributor of television programming. King World produces and distributes the daily television news program "Inside Edition," which is broadcast by television stations located throughout the United States.

The Los Angeles Times is the nation's second largest daily metropolitan newspaper with a circulation of more than 1.4 million daily and more than 1.5 million on Sunday.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership approximately 200 domestic magazine publishers who publish over 800 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly

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publications covering government, law, literature, religion, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public interest and concern.

National Broadcasting Company, Inc. ("NBC") operates a national television network of more than 200 affiliates and 13 owned-and-operated stations that broadcast its programming throughout the United States. NBC reports on matters of general public concern through its Network News Division (which produces, among other programming, *Nightly News with Tom Brokaw, Today,* and *Dateline NBC*) as well as its cable news networks, MSNBC and CNBC.

The National Cable Television Association is the principal trade association of the cable television industry in the United States. Its members include the owners and operators of cable television systems serving over 80 percent of the nation's approximately 65.9 million cable households, as well as the owners and operators of more than 100 cable program networks.

Newspaper Association of America, Inc. ("NAA") is a nonprofit organization representing the interests of more than 1,500 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for almost ninety percent of the daily newspaper circulation in the United States. NAA membership also includes many non-daily U.S. newspapers. NAA represents the First Amendment interests of newspapers to gather and report news and information of public concern.

The Orange County Register, a division of Freedom Communications, Inc., publishes a daily newspaper in

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Santa Ana, California, with a circulation of more than 350,000.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedom case that has been litigated in the United States since 1970.

Tribune Company is a diversified news, information and entertainment company based in Chicago. Among other things, it operates sixteen television stations, four radio stations and a regional cable news service, it publishes four daily newspapers, and produces nationally-syndicated radio and television programs.

Univision Television Group, Inc. is the leading Spanish language television broadcaster in the United States. Univision owns and operates 13 full-power stations in major markets, including Los Angeles, San Francisco, New York, Chicago and Miami. In addition, Univision owns and operates eight low-power stations. All of Univision's full-power stations and five of the low-power stations broadcast news. As a group, Hispanics in the United States constitute the world's fifth-largest Spanish-speaking population. More than two-thirds of Hispanics speak Spanish at home. News broadcasting is a vital component of Univision's overall television programming and it is expected that Univision will continue to be the leading source of news for Hispanic Americans.